



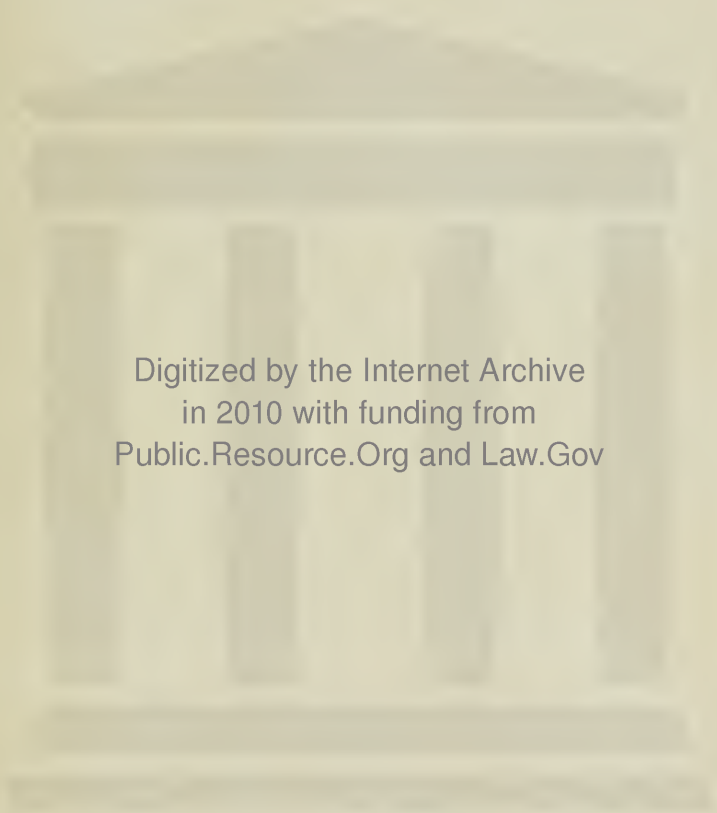
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No. 10675

United States *Vol*
Circuit Court of Appeals

For the Ninth Circuit. *2372*

OREGON SHORT LINE RAILROAD COM-
PANY, a corporation, SAINT PAUL-MER-
CURY INDEMNITY COMPANY OF ST.
PAUL, a corporation and UNION PACIFIC
RAILROAD COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Eastern Division

No. 10675

United States
Circuit Court of Appeals

For the Ninth Circuit.

OREGON SHORT LINE RAILROAD COMPANY, a corporation, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation and UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellants,

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for the District of Idaho
Eastern Division

L. J. Lane, Editor

19 Boston

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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OF RECORD

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
In and For the District of Idaho
Eastern District

No. 1182

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE OREGON SHORT LINE RAILROAD, a
Corporation, SAINT PAUL-MERCURY IN-
DEMNITY COMPANY OF ST. PAUL, a Cor-
poration, and UNION PACIFIC RAILROAD
COMPANY, a Corporation,
Defendants.

COMPLAINT

The United States of America, plaintiff, by its duly appointed, authorized, acting and proper United States Attorney for the District of Idaho for its cause of action against the above-named defendants, states:

FIRST COUNT

I.

That this action is instituted in the name of the United States of America for and on behalf of the Shoshone and Bannock Tribes of Indians for damages accruing by reason of the killing and maiming of certain Indian persons hereinafter named in the manner and form hereinafter described.

II.

That the United States District Court for the District of Idaho has jurisdiction of this action for the reason that the United States of America is party plaintiff herein and for the further reason that said action is authorized and directed by the provisions of an Act of Congress under date of September 1, 1888 (25 Stat. L. 452).

III.

That the defendant, Oregon Short Line Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Utah; that said [3] corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal place of business in Idaho at the City of Pocatello in the State and District of Idaho, Eastern Division.

IV.

That said defendant, Oregon Short Line Railroad Company, is the successor in interest of Utah and Northern Railway Company, a railway company named in the Act of Congress hereinabove mentioned, to-wit: 25 Stat. L. 452.

V.

That the defendant, Saint Paul-Mercury Indemnity Company of St. Paul is a corporation organized and existing under and by virtue of the laws of the State of Delaware and doing and authorized to do business in the State and District of Idaho.

with an agent upon whom process may be served in the State of Idaho as provided for in Title 6, Section 7, U.S.C.A.

VI.

That on the third day of July 1868, at Fort Bridger in the territory of Utah, the United States of America on behalf of its citizens, and the Shoshone and Bannock tribes of Indians on behalf of its members, in order to maintain peace among the parties, made and concluded a treaty wherein said parties solemnly agreed, among other things, as follows:

And the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon or reside in the territory described in this Article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid. (15 Stat. L. 673—11 Kappler 1021.) [4]

That the Indian reservation and territory therein above referred to is the Fort Hall Indian Reservation in the State and District of Idaho; that the said defendant, Oregon Short Line Railroad Company or its predecessor, was not one of the persons

designated or authorized to go upon said lands in said treaty.

VII.

As a consequence of the matters and things hereinabove set forth and in order that commerce and civilization might cross the prairies and extend to the Pacific coast, and that a railroad, the predecessor of the said Oregon Short Line Railroad Company, be privileged to operate over said Indian Reservation, the Congress of the United States of America reconsidered the treaty provisions hereinabove referred to as will more particularly appear in a report made to Congress from the Committee on Indian Affairs, referred to the House calendar and ordered to be printed on June 5, 1888, a copy of which said report is hereto attached, marked Exhibit A and by reference made a part hereof. That it was the intention of Congress as therein expressed and provided that every interest of the Shoshone and Bannock tribes of Indians be jealously guarded and protected against damages in all cases suffered by the Indians on account of the privilege to be granted said railroad.

VIII.

That in order to carry said intention into effect and for the purpose of jealously guarding and protecting said Shoshone and Bannock tribes of Indians and their posterity and in consideration of permitting and granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a rail-

road system and/or business upon, over and across said Fort Hall Indian [5] Reservation, the said Congress of the United States and said Indians entered into a further memorandum of agreement and the said Congress enacted a statute under date of September 1, 1888 (25 Stat. L. 452) providing among other things, that said Utah and Northern Railway Company, its successors and assigns, execute a bond in the penal sum of \$10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians, the conditions of said bond being by statute provided as follows:

That said railway company shall execute a bond to the United States to be filed with and approved by the Secretary of the Interior in the penal sum of \$10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes or either of them or of their livestock, in the construction or operation of said railway or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States:

That the memorandum agreement herein mentioned is contained in the Act of Congress of September 1, 1888 hereinabove referred to.

IX.

That the defendant, Oregon Short Line Railroad Company, is the successor in interest of Utah Northern Railway Company and as such the said defendant is now and at all times material to this action has by reason of the terms of said solemn treaty herein mentioned as modified by said memorandum agreement herein referred to and by virtue of the special Act of Congress mentioned herein, operated and maintained a railroad system running railroad engines, cars and trains, across, over, through and upon said Fort Hall Indian Reservation. [6]

X.

That for the privilege of maintaining and operating said railroad trains, engines and cars, over, through and across said Fort Hall Reservation and by reason of the provisions of said treaty, agreement, and the Act of Congress herein mentioned and by reference made a part hereof, the defendants, Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company of St. Paul, made, executed and delivered to the United States for the use and benefit of the Shoshone and Bannock tribes of Indians and parties in interest, a bond as required by said special Act and in consideration of the privilege herein referred to, the said bond being in words and figures as follows, to-wit:

BOND

Be It Known, That we, the undersigned, Oregon Short Line Railroad Company, a corporation, successor to the Utah and Northern Railway Company, as principal, and Saint Paul-Mercury Indemnity Company of Saint Paul as surety, are held and firmly bound unto the United States of America in the penal sum of Ten Thousand Dollars (\$10,000.00), lawful money of the United States, for which payment, well and truly to be made, we and each of us bind ourselves, our successors, assigns, heirs, administrators, and executors, jointly and severally, firmly by these presents. The condition of this obligation is such that,

Whereas, The Congress of the United States, by the Act of September 1, 1888 (25 Stat. L. 455), granted a right of way to the Utah and Northern Railway Company over and across the Fort Hall Indian Reservation in the State of Idaho, and

Whereas, Section 14 of said act requires that the company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of \$10,000, for the use and benefit of the Shoshone and Bannock Tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their live stock, in the construction or operation of said railway, or by reason of fires originating thereby; [7]

Now Therefore, if the said Oregon Short Line

Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, or damages, then this obligation shall be null and void; otherwise, to remain in full force and effect.

Signed, sealed, and delivered, on this 30th day of July, A. D. 1935.

[Seal] OREGON SHORT LINE RAIL-
ROAD COMPANY

(Principal)

By /s/ C. R. GRAY

Its President

Attest:

/s/ E. M. KINDLER

[Seal] Assistant Secretary

[Seal] SAINT PAUL-MERCURY IN-
DEMNITY COMPANY OF
SAINT PAUL

(Surety)

By WM. F. PATTERSON

Attorney-in-fact

Department of the Interior

Washington

Approved

/s/ OSCAR T. CHAPMAN

Assistant Secretary.

5-3 (undecipherable)

XI.

That the said defendants by reason of said bond and the laws applicable thereto, became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed or maimed, to make due payment for all damages accruing therefrom; that the said defendants agreed and promised according to the terms of said bond to make due payment for any and all damages accruing by the killing or maiming of any Indian belonging to either of the tribes hereinabove mentioned and agreed and promised to pay said bond and/or obligation according to its tenor and the provisions of the Act of Congress hereinabove referred to, and that damages be paid in all cases in the absence of an amicable settlement made by said defendants.

[8]

XII.

That on the 29th day of October 1941 the Union Pacific Railroad Company as successor, assignee or lessee of the defendant Oregon Short Line Railroad Company, while operating a railroad train over, through, and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into and upon a certain automobile occupied by Ninip Toane, Helen Toane and Frank Poewe, said persons being

Indians and members of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Indian Reservation for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed and being wards of the United States Government, having a right to be on said Fort Hall Reservation at the place and point where said Indians were maimed and killed; that the said railroad train operating as aforesaid did run into and cause such serious injury as to result in the death of the said Ninip Toane and the said Helen Toane, his wife; that said railroad train did cause severe and permanent injuries to the said Frank Pooewe in that the said train at the time of the collision herein mentioned did cut, bruise and injure the said Frank Pooewe in and about his head, legs and body and did otherwise inflict injury to the said Frank Pooewe resulting in great pain and suffering and both temporary and permanent disability.

XIII.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein, as required by said bond and the provisions of the Act of Congress of [9] September 1, 1888 hereinabove referred to and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress although demand for payment has been made; that funeral expenses incurred for the burial

of the Indian persons killed as hereinabove set forth approximate the sum of \$2,000.00; that by reason of the matters and things herein alleged and set forth and by reason of the death of said Indians Ninip Toane and Helen Toane, his wife, and by reason of the severe and permanent injury to Frank Pooewe the parties in interest have suffered and sustained other damages in substantial amounts; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the deceased and injured persons the sum of \$10,000.00.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of \$10,000.00 with interest thereon until paid and for its costs and disbursements herein incurred.

SECOND COUNT

Plaintiff for the Second Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the First Count of this complaint and alleges as follows:

XII.

That on the 29th day of October, 1941 the Union Pacific Railroad Company as successor, assignee or

less of the defendant Oregon Short Line Railroad Company while operating a railroad [10] train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Ninip Toane, with such violence as to cause the death of the said Ninip Toane, said person being an Indian and member of the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Indian Reservation for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government having a right to be on said Fort Hall Reservation at the place and point where said Indian person was killed.

XIII.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by said bond and the provisions of the Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made;

that the funeral expenses incurred for the burial of the said Ninip Toane approximate the sum of \$1,000.00; that by reason of the matters and things herein alleged and set forth the heirs, representatives and parties in interest of the deceased Ninip Toane have suffered and sustained other substantial damages; that there is due, owing and unpaid from the defendants to the [11] plaintiff for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the said Ninip Toane the sum of \$10,000.00.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

THIRD COUNT

Plaintiff for the Third Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the First Count of this complaint and alleges as follows:

XII.

That on the 29th day of October 1941 the Union Pacific Railroad Company as successor, assignee or *less* of the defendant Oregon Short Line Railroad Company while operating a railroad train over, through and across said Fort Hall Indian Reserva-

tion at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Helen Toane, with such violence as to cause the death of the said Helen Toane, said person being an Indian and member of the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Indian Reservation for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a [12] ward of the United States Government having a right to be on said Fort Hall Reservation at the place and point where said Indian person was killed.

XIII.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by said bond and the provisions of the Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that the funeral expenses incurred for the burial of the said Helen Toane approximate the sum of \$1,000.00; that by reason of the matters and things

herein alleged and set forth the heirs, representatives and parties in interest of the deceased Helen Toane have suffered and sustained other substantial damages; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the said Helen Toane the sum of \$10,000.00.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

FOURTH COUNT

Plaintiff for the Fourth Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations heretofore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the First [13] Count of this complaint and alleges as follows:

XII.

That on the 29th day of October 1941 the Union Pacific Railroad Company as successor, assignee or lessee of the defendant Oregon Short Line Railroad Company, while operating a railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the W $\frac{1}{2}$ of the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 2, T. 5 S.,

R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Frank Pooewe, causing severe and painful injuries to the said Frank Pooewe, said person being an Indian and a member of the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Indian Reservation for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government, having a right to be on said Fort Hall Reservation at the Place and point where said Indian person was injured.

XIII.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by said bond and the provisions of the Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that by reason of the injuries sustained as aforesaid by the said Frank Pooewe, the said Frank Pooewe has suffered and incurred various and [14] diverse expenses in and about being relieved and cured of said injuries; that he has suffered great pain and mental anguish as a result of said injuries and has suffered both temporary and permanent disability

by reason of same and has otherwise been damaged in the sum of \$10,000.00; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and for the use and benefit of the said Frank Poewe and other parties in interest the sum of \$10,000.00.

Wherefore, plaintiff demands judgment against the defendants jointly and severally in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

FIFTH COUNT

Plaintiff for the Fifth Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the First Count of this complaint and alleges as follows:

XI.

That the defendant Union Pacific Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and that said corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal place of business in Idaho at the city of Pocatello, in the State and District of Idaho, Eastern Division. [15]

XII.

That on or about January 1 1936 said defendant Union Pacific Railroad Company entered into a certain lease, assignment or agreement with the defendant Oregon Short Line Railroad Company whereby and under the terms of which the said Oregon Short Line Railroad Company leased all of its property to the said defendant Union Pacific Railroad Company and that since said date the said defendant Union Pacific Railroad Company has been at all times in the management, control and operation of said property.

XIII.

That by reason of the Act of Congress granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a railroad system and/or business upon, over and across said Fort Hall Indian Reservation, the defendant Oregon Short Line Railroad Company and the defendant Union Pacific Railroad Company became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured to make due payment for all damages accruing therefrom; that the said defendants agreed and promised, in the acceptance of the benefits of said statute as successor in interest to the Utah and Northern Railway Company, to make due payment for any and all damages accruing by reason of the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned,

without regard to any limitation upon the amount of any damages suffered and sustained by any person or persons in interest by reason of said killing, maiming or injury; that to provide for payment of damages the defendant Oregon Short Line Railroad Company did execute said bond; that said Act of Congress, while requiring said bond of the defendant Utah and Northern Railway Company and its successors in interest, did not limit the liability of the Utah and Northern Railway Company or its successors in [16] interest for any damages resulting from the operation of said railway to the amount of said bond; that it was the intent of Congress in the adoption and passage of said Act to provide for a fund or indemnity for the payment of damages suffered and sustained by reason of the operation of said railway through said reservation but that it was the intent and purpose of said act, as appears therefrom, that the said Utah and Northern Railway Company or its successors in interest should become and remain absolutely liable for any and all damages suffered or sustained by any Indian or Indians on said reservation to the full extent of such damages.

XIV.

That the said defendant Saint Paul-Mercury Indemnity Company by reason of the execution of said bond and the laws applicable thereto became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured, to make due payment for all damages accruing therefrom up to but not exceeding the sum of \$10,000.00; that the said defendant agreed and

promised, according to the terms of said bond, to make due payment for any and all damages accruing by the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, and agreed and promised to pay said bond or obligation according to its tenor and the provisions of the Act of Congress hereinabove referred to, and that such damages be paid in all cases in the absence of an amicable settlement of any and all claims made upon said defendant Oregon Short Line Railroad Company and said defendant Saint Paul-Mercury Indemnity Company.

XV.

That on the 29th day of October 1941 the defendant Union Pacific Railroad Company while operating under the aforesaid lease and in the operation and management of its [17] railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Ninip Toane, with such violence as to cause the death of the said Ninip Toane, said person being an Indian and member of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Reservation, for whose benefit the treaty agreement, special act and bond herein mentioned and set

forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government, having a right to be on said Fort Hall Reservation at the place and point where said Indian person was killed.

XVI.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by the provisions of said Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that the funeral expenses incurred for the burial of the said Ninip Toane approximate the sum of \$1,000.00; that by reason of the matters and things herein alleged and set forth the heirs, representatives and parties in interest of the deceased Ninip Toane have suffered and sustained other substantial damages; that there is due, owing and unpaid from the defendants to the plaintiffs for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the said Ninip Toane the sum of \$25,000.00. [18]

Wherefore, plaintiff demands judgment against the defendants Oregon Short Line Railroad Company and Union Pacific Railroad Company in the sum of \$25,000.00 and against the defendant Saint Paul-Mercury Indemnity Company in the sum of

\$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

SIXTH COUNT

Plaintiff for the Sixth Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the First Count of this complaint and alleges as follows:

XI.

That the defendant Union Pacific Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and the said corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal place of business in Idaho at the city of Pocatello, in the State and District of Idaho, Eastern Division.

XII.

That on or about January 1, 1936 said defendant Union Pacific Railroad Company entered into a certain lease, assignment or agreement with the defendant Oregon Short Line Railroad Company whereby and under the terms of which the said Oregon Short Line Railroad Company leased all of its property to the said defendant Union Pacific Railroad Company and that since said date the said defendant Union Pacific Railroad Company has

been at all times in the management, control and operation of said property.

XIII.

That by reason of the Act of Congress granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a [19] railroad system and/or business upon, over and across said Fort Hall Indian Reservation, the defendant Oregon Short Line Railroad Company and the defendant Union Pacific Railroad Company became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured to make due payment for all damages accruing therefrom; that the said defendants agreed and promised, in the acceptance of the benefits of said statute as successor in interest to the Utah and Northern Railway Company, to make due payment for any and all damages accruing by reason of the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, without regard to any limitation upon the amount of any damages suffered and sustained by any person or persons in interest by reason of said killing, maiming or injury; that to provide for payment of damages the defendant Oregon Short Line Railroad Company did execute said bond; that said Act of Congress, while requiring said bond of the defendant Utah and Northern Railway Company and its successors in interest, did not limit the liability of the Utah and Northern Railway Company or its

successors in interest for any damages resulting from the operation of said railway to the amount of said bond; that it was the intent of Congress in the adoption and passage of said Act to provide for a fund or indemnity for the payment of damages suffered and sustained by reason of the operation of said railway through said reservation but that it was the intent and purpose of said act, as appears therefrom, that the said Utah and Northern Railway Company or its successors in interest should become and remain absolutely liable for any and all damages suffered or sustained by any Indian or Indians on said reservation to the full extent of such damages. [20]

XIV.

That the said defendant Saint Paul-Mercury Indemnity Company by reason of the execution of said bond and the laws applicable thereto became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured, to make due payment for all damages accruing therefrom up to but not exceeding the sum of \$10,000.00; that the said defendant agreed and promised, according to the terms of said bond to make due payment for any and all damages accruing by the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, and agreed and promised to pay said bond or obligation according to its tenor and the provisions of the Act of Congress hereinabove referred to, and that such damages be paid in all cases in the absence of an amicable settlement of any and all

claims made upon said defendant Oregon Short Line Railroad Company and said defendant Saint Paul-Mercury Indemnity Company.

XV.

That on the 29th day of October 1941 the defendant Union Pacific Railroad Company while operating under the aforesaid lease and in the operation and management of its railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County Road and U. S. Highway No. 91, within the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Helen Toane, with such violence as to cause the death of the said Helen Toane, said person being an Indian and member of the Shoshone and Bannock tribes of Indians residing on [21] the Fort Hall Reservation, for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government, having a right to be on said Fort Hall Reservation at the place and point where said Indian person was killed.

XVI.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest

herein as required by the provisions of said Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that the funeral expenses incurred for the burial of the said Helen Toane approximate the sum of \$1,000.00; that by reason of the matters and things herein alleged and set forth the heirs, representatives and parties in interest of the deceased Helen Toane have suffered and sustained other substantial damages; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock Tribes of Indians and the heirs, representatives and parties in interest of the said Helen Toane the sum of \$25,000.00.

Wherefore, plaintiff demands judgment against the defendants Oregon Short Line Railroad Company and Union Pacific Railroad Company in the sum of \$25,000.00 and against the defendant Saint Paul-Mercury Indemnity Company in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred. [22]

SEVENTH COUNT

Plaintiff for the Seventh Count of its complaint filed herein adopts by reference as though the same were fully restated and repeated herein each and every of the allegations hereinbefore set forth and contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the First Count of this complaint and alleges as follows:

XI.

That the defendant Union Pacific Railroad Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and that said corporation is now and at all times material to this action has been doing business in the State and District of Idaho as a railroad and common carrier, having its principal place of business in Idaho at the city of Pocatello, in the State and District of Idaho, Eastern Division.

XII.

That on or about January 1, 1936 said defendant Union Pacific Railroad Company entered into a certain lease, assignment or agreement with the defendant Oregon Short Line Railroad Company whereby and under the terms of which the said Oregon Short Line Railroad Company leased all of its property to the said defendant Union Pacific Railroad Company and that since said date the said defendant Union Pacific Railroad Company has been at all times in the management, control and operation of said property.

XIII.

That by reason of the Act of Congress granting the privilege to the Utah and Northern Railway Company, its successors and assigns, to construct, operate and maintain a [23] railroad system and/or business upon, over and across said Fort Hall Indian Reservation, the defendant Oregon Short Line Railroad Company and the defendant Union Pacific Railroad Company became obligated in the event

that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured to make due payment for all damages accruing therefrom; that the said defendants agreed and promised, in the acceptance of the benefits of said statute as successor in interest to the Utah and Northern Railway Company, to make due payment for any and all damages accruing by reason of the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, without regard to any limitation upon the amount of any damages suffered and sustained by any person or persons in interest by reason of said killing, maiming or injury; that to provide for payment of damages the defendant Oregon Short Line Railroad Company did execute said bond; that said Act of Congress, while requiring said bond of the defendant Utah and Northern Railway Company and its successors in interest, did not limit the liability of the Utah and Northern Railway Company or its successors in interest for any damages resulting from the operation of said railway to the amount of said bond; that it was the intent of Congress in the adoption and passage of said Act to provide for a fund or indemnity for the payment of damages suffered and sustained by reason of the operation of said railway through said reservation but that it was the intent and purpose of said act, as appears therefrom, that the said Utah and Northern Railway Company or its successors in interest should become and remain absolutely liable for any and all damages suffered or sustained by any Indian or Indians

on said reservation to the full extent of [24] such damages.

XIV.

That the said defendant Saint Paul-Mercury Indemnity Company by reason of the execution of said bond and the laws applicable thereto became obligated in the event that any member of the Shoshone and Bannock tribes of Indians were killed, maimed or injured, to make due payment for all damages accruing therefrom up to but not exceeding the sum of \$10,000.00; that the said defendant agreed and promised, according to the terms of said bond to make due payment for any and all damages accruing by the killing, maiming or injuring of any Indian belonging to either of the tribes hereinabove mentioned, and agreed and promised to pay said bond or obligation according to its tenor and the provisions of the Act of Congress hereinabove referred to, and that such damages be paid in all cases in the absence of an amicable settlement of any and all claims made upon said defendant Oregon Short Line Railroad Company and said defendant Saint Paul-Mercury Indemnity Company.

XV.

That on the 29th day of October 1941 the defendant Union Pacific Railroad Company while operating under the aforesaid lease and in the operation and management of its railroad train over, through and across said Fort Hall Indian Reservation at a point where said railroad crosses what is known as the school railroad crossing between the County

Road and U. S. Highway No. 91, within the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 2, T. 5 S., R. 34 E., B.M., on the Fort Hall Indian Reservation, in the County of Bingham, State and District of Idaho, ran said railroad train into a certain automobile occupied by Frank Pooewe, causing severe and painful injuries to [25] the said Frank Pooewe, said person being an Indian and a member of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Reservation, for whose benefit the treaty agreement, special act and bond herein mentioned and set forth were made, passed, enacted, concluded and executed, and also being a ward of the United States Government, having a right to be on said Fort Hall Reservation at the place and point where said Indian person was injured.

XVI.

That the said defendants have failed, neglected and refused to make an amicable settlement or any settlement whatsoever with the parties in interest herein as required by the provisions of the Act of Congress of September 1, 1888, hereinabove referred to, and have failed, neglected and refused to observe and pay the obligations incurred by said defendants under said bond and Act of Congress, although demand for payment has been made; that by reason

of the injuries sustained as aforesaid by the said Frank Pooewe, the said Frank Pooewe has suffered and incurred various and diverse expenses in and about being relieved and cured of said injuries; that he has suffered great pain and mental anguish as a result of said injuries and has suffered both temporary and permanent disability by reason of same and has otherwise been damaged in the sum of \$25,000.00; that there is due, owing and unpaid from the defendants to the plaintiff for the use and benefit of the Shoshone and Bannock tribes of Indians and for the use and benefit of the said Frank Pooewe and other parties in interest the sum of \$25,000.00.

Wherefore, plaintiff demands judgment against the defendants Oregon Short Line Railroad Company and Union [26] Pacific Railroad Company in the sum of \$25,000.00 and against the defendant Saint Paul-Mercury Indemnity Company in the sum of \$10,000.00 with interest thereon until paid, and for its costs and disbursements herein incurred.

UNITED STATES OF AMERICA,

By JOHN A. CARVER,
United States Attorney.

[Endorsed]: Filed June 4, 1942. [27]

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT

MOTION FOR BILL OF PARTICULARS

Come now the defendants and pursuant to Rule 12 e of the Rules of Civil Procedure move (1) for a more definite statement, and (2) for a bill of particulars, in order to enable said defendants to prepare their responsive pleadings and to prepare for trial.

MOTION TO MAKE MORE DEFINITE
AND CERTAIN

First Count—

- a. Supply a copy of Exhibit “A” referred to in the First Count of said complaint as no such exhibit was attached to or served with any copy of the complaint served on any of the defendants.
- b. Specify by relationship and names the persons referred to in paragraph XIII as the “parties in interest”, with whom it is alleged the defendants should have but failed to make an amicable settlement.
- c. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased and injured persons” referred to at the end of paragraph XIII, whom the plaintiff claims to have suffered damages and in whose behalf judgment is sought.

Second Count—

- a. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased Ninip Toane” referred to at the end of paragraph XIII, whom the plaintiff claims have suffered damages and in whose behalf judgment is sought.

Third Count—

- a. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased Helen Toane” referred to at the end of paragraph XIII, whom the plaintiff claims have suffered damages and in whose behalf judgment is sought. [28]

Fourth Count—

- a. Specify the nature and character of the “suffering and painful injuries” alleged in paragraph XII.
- b. Specify by relationship and names the persons designated as “other parties in interest” referred to at the end of paragraph XIII, whom the plaintiff claims have suffered damages and in whose behalf judgment is sought.

Fifth Count—

- a. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased Ninip Toane” referred to at the end of paragraph XVI, whom plaintiff claims have suffered

damages and in whose behalf judgment is sought.

Sixth Count—

- a. Specify by relationship and names the persons designated as “heirs, representatives, and parties in interest of the deceased Helen Toane” referred to at the end of paragraph XVI, whom the plaintiff claims have suffered damages and in whose behalf judgment is sought.

Seventh Count—

- a. Specify the character and extent of the “suffering and painful injuries” alleged in paragraph XV.
- b. Furnish particulars in support of the averment that Frank Pooewe has suffered “both temporary and permanent disability” alleged in paragraph XVI.
- c. Furnish particulars in support of the averment that Frank Pooewe has suffered “both temporary and permanent disability and has otherwise been damaged” alleged in paragraph XVI.
- d. Designate by names, ages and residences and the particulars supporting the averment in paragraph XVI of damages to “other parties in interest.”

BILL OF PARTICULARS

First Count—

- a. Supply a copy of Exhibit “A” therein referred to as no such exhibit was attached to or served with any copy of complaint served on any of the defendants.
- b. The items and amounts and by whom paid or obligated and to whom paid and incurred amounting to the sum of \$2,000.00 for funeral expenses alleged in paragraph XIII of the first count.
- c. A statement of the items and amounts of “other damages in substantial amounts” alleged in paragraph XIII of the first count, and by whom contracted and paid and to whom. [29]
- d. A statement of the items and amounts and basis of arriving at the difference between \$2,000.00 and “other damages” alleged in paragraph XIII of the first count and the sum of \$10,000.00 therein demanded.

Second Count—

- a. The items and amounts and by whom incurred and to whom and when aggregating approximately \$1,000.00 for funeral expenses, and a similar itemization or statement of the “other substantial damages” alleged in paragraph XIII of said second count, and the basis of arriving at the difference between their aggre-

gate and the sum of \$10,000.00 therein demanded.

Third Count —

- a. The items and amounts and by whom incurred and to whom and when aggregating approximately \$1,000.00 for funeral expenses, and a similar itemization or statement of the “other substantial damages” alleged in paragraph XIII of said third count, and the basis of arriving at the difference between their aggregate and the sum of \$10,000.00 therein demanded.

Fourth Count—

- a. A statement of the “various and diverse expenses” showing the dates and amounts and to whom paid and by whom paid, alleged in paragraph XIII of said count, and the basis of arriving at the difference between their aggregate and the sum of \$10,000.00 therein demanded, and the names and relationship of the “other parties in interest” therein mentioned.

Fifth Count—

- a. A statement of the items and amounts and by whom incurred and to whom and when aggregating approximately \$1,000.00 for funeral expenses and a similar itemization or statement of the “other substantial damages” alleged in paragraph XVI of said fifth count, and the basis of arriving at the difference between their aggregate and the sum of \$25,000.00 therein demanded, and the names and rela-

tionship of the "heirs, representatives and parties in interest" therein mentioned.

Sixth Count—

- a. A statement of the items and amounts and by whom incurred and when aggregating approximately \$1,000.00 for funeral expenses and a similar itemization or statement of the "other substantial damages" alleged in paragraph XVI of said sixth count, and the basis of arriving at the difference between their aggregate and the sum of \$25,000.00 therein demanded, and the names and relationship of the "heirs, representatives and parties in interest" therein mentioned. [30]

Seventh Count—

- a. A statement of the "various and diverse expenses" showing the dates and amounts and to whom paid and by whom paid alleged in paragraph XVI of said count, and the basis of arriving at the difference between their aggregate and the sum of \$25,000.00 therein demanded, and the names and relationship of the "other parties in interest" mentioned in said paragraph.

GEO. H. SMITH,

H. B. THOMPSON

L. H. ANDERSON,

Attorneys for Defendants.

Residence & P. O. Address:

Attorneys for Defendants:

GEO. H. SMITH,
Salt Lake City, Utah.

H. B. THOMPSON, and
L. H. ANDERSON,
Pocatello, Idaho.

Service and receipt of a copy of the foregoing Motion for More Definite Statement and Motion for Bill of Particulars is hereby admitted this 22nd day of June, 1942.

JOHN A. CARVER, AG
United States Attorney.

[Endorsed]: Filed June 22, 1942. [31]

[Title of District Court and Cause.]

BILL OF PARTICULARS, ETC.

Comes Now the United States of America, plaintiff, and, waiving the entry of an order herein on the consolidated motions of defendants for a more definite statement and for a bill of particulars in response to said motions, tenders the following:

I.

PARTICULARS REQUESTED UNDER MOTION TO MAKE MORE DEFINITE AND CERTAIN

First Count

(a) Attached hereto is a copy of Exhibit "A"

referred to in the first count of plaintiffs complaint.

(b) As to paragraph XIII the parties in interest referred to in said paragraph are: 1. The Shoshone and Bannock Tribes of Indians; 2. As to Ninip Toane, the Shoshone and Bannock Tribes, Irwin Toane, his son, Fort Hall, Idaho, and Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Ft. Washakie, Wyoming; [32]

3. As to Helen Toane, the Shoshone and Bannock Tribes; Adelia Toomuzzo Weiser, her mother, Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters; all of Fort Hall, Idaho.

As to Frank Poewe, the Shoshone and Bannock Tribes;

(c) As to paragraph XIII the parties in interest referred to in said paragraph are: 1. The Shoshone and Bannock Tribes of Indians: 2. As to Ninip Toane, the Shoshone and Bannock Tribes, Irwin Toane, son; Fort Hall, Idaho, and Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Ft. Washakie, Wyoming;

3. As to Helen Toane, the Shoshone and Bannock Tribes: Adelia Toomuzzo Weiser, her mother, Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters; all of Fort Hall, Idaho;

As to Frank Poewe, the Shoshone and Bannock Tribes;

Second Count

(a) As to Ninip Toane, The Shoshone and Ban-

nock Tribes of Indians, Irwin Toane, son; Fort Hall, Idaho; and Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Fort Washakie, Wyoming; [33]

Third Count

(a) As to Helen Toane, the Shoshone and Bannock Tribes of Indians; Adelia Toomuzzo Weiser, her mother; Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters, all of Fort Hall, Idaho;

Fourth Count

(a) Nature and character of suffering and painful injuries: Traumatic hemorrhage of abdomen; fracture of right twelfth rib; contusions of forehead, right eye, arm and hip; nervous disorder; pain in movement of hip and leg; cardiac disease, valvular; trachoma.

(b) The Shoshone and Bannock Tribes of Indians;

Fifth Count

(a) The Shoshone and Bannock Tribes of Indians; Irwin Toane, son, Fort Hall, Idaho, and Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Ft. Washakie, Wyoming;

Sixth Count

(a) The Shoshone and Bannock Tribes of Indians; Adelia Toomuzzo Weiser, mother; Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters, all of Fort Hall, Idaho; [34]

Seventh Count

(a) Character and extent of suffering and painful injuries: Traumatic hemorrhage of abdomen; fracture of right twelfth rib; contusions of forehead, right eye, arm and hip; nervous disorder; pain in movement of hip and leg; cardiac disease, valvular; trachoma.

(b) Temporary and permanent disability: Approximately one month's confinement in hospital; suffering from injuries above-mentioned and nervous disorders attendant upon same, including worsening of cardiac disease and trachoma; at least 25% limitation in movement of right hip; limitation on use of legs; increased danger to existing diseases and continued nervousness and nervous disorders, permanently disabling said Frank Poewe.

(c) Otherwise damaged: Continuous and recurring pain and nervousness; permanent danger to existing diseases of heart and trachoma; loss of ability to move about normally; loss of ability to work; diminution of earning capacity; medical and hospital bills; liability for damage to automobile truck resulting from accident; mental anguish. [35]

(d) Shoshone and Bannock Tribes of Indians:

II.

PARTICULARS REQUESTED UNDER
MOTION FOR BILL OF PARTICULARS

First Count

(a) Exhibit "A" referred to in complaint attached hereto.

(b) Funeral Expenses:

\$145 to McCann Undertaking Parlor
 paid by Estate of Helen Poorah-
 rah Toane\$ 22.50
 and by Estate of Ninip Toane,.. 122.50

\$150.00 for beef, one owned by Ninip Toane
 Estate, value \$75.00, one owned by Bill
 Edmo, value \$75.00, both slaughtered
 under Agency permit.

\$79.00 for clothing, as follows:

Moccasins	\$ 2.00
Buckskin vest	6.00
Silk shirt	4.00
Buckskin pants	12.00
Beaded necktie	1.50
Silk scarf	3.50
10 silk scarves	30.00
Misc.—mourners	20.00

\$79.00

paid for in equal parts by Annie Elk
 Edmo, Irwin Toane, Toane, and Pansy
 Edmo.

\$63.28 for groceries, purchased from Safe-
 way Store, Inc., Pocatello, Idaho
 paid in equal parts by Annie Elk Edmo,
 Irwin Toane, Toane, and Pancy Edmo.

(c) Other damages: Automobile truck, \$220.00
 Pocatello General Hospital, \$34.30, and \$5.00 to
 Dr. W. L. Olsen, both paid by Fort Hall Agency;

loss of companionship; future earnings, support and maintenance; total and permanent disability.

[36]

(d) Basis of claim for \$10,000.00; Items heretofore mentioned; loss of companionship; maintenance and support; pain and suffering, total and permanent disability; mental anguish.

Second Count

(a) Ninip Toane—Funeral Expenses:

\$145.00 to McCann Undertaking Parlor paid by Estate of Helen Poorahrah Toane\$ 22.50
and by Estate of Ninip Toane.. 122.50

\$150.00 for beef, one owned by Ninip Toane Estate, value, \$75.00, one owned by Bill Edmo, value \$75.00, both slaughtered under Agency permit.

\$79.00 for clothing, as follows:

Moccasins	\$ 2.00
Buckskin vest	6.00
Silk shirt	4.00
Buckskin pants	12.00
Beaded necktie	1.50
Silk scarf	3.50
10 silk scarves	30.00
Misc.—mourners	20.00

\$79.00

paid for in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

\$63.28 for groceries, purchased from Safe-way Store, Inc., Pocatello, Idaho
paid in equal parts by Annie Elk Edmo,
Irwin Toane, Toane, and Pansy Edmo.

(b) Other damages: Loss of companionship;
future earnings; loss of support.

(c) Basis of claim for \$10,000.00: Loss of com-
panionship; future support and maintenance.

Third Count

(a) Helen Toane—Funeral Expenses:

\$145.00 to McCann Undertaking Par-
lor paid by Estate of Helen
Poorahrah Toane\$ 22.50
and paid by Estate of Ninip
Toane 122.50

[37]

\$150.00 for beef, one owned by Ninip Toane
Estate, value, \$75.00, one owned by Bill
Edmo, value \$75.00, both slaughtered
under Agency permit.

\$79.00 for clothing, as follows:

Moccasins	\$ 2.00
Buckskin vest	6.00
Silk shirt	4.00
Buckskin pants	12.00
Beaded necktie	1.50
Silk scarf	3.50
10 silk scarves	30.00
Misc.—mourners	20.00

\$79.00

paid for in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

\$63.28 for groceries, purchased from Safeway Store, Inc., Pocatello, Idaho

paid in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

(b) Other damages: Loss of companionship; future earnings; loss of support.

(c) Basis of claim for \$10,000.00: Loss of companionship; future support and maintenance.

Fourth Count

(a) Frank Poewe—Expenses:

Medical and hospital, Pocatello General Hospital, Dr. W. L. Olsen \$42.40; Fort Hall Agency Hospital: liability of \$220.00 to Lamar Pokibro for truck damaged; dates October 29, 1941 to November 24, 1941.

(b) Basis of claim for \$10,000.00:

Pain and suffering physically and mentally; total and permanent disability; damage to capacity to work; loss of earnings; mental anguish; worsening of existing diseases; nervousness and nervous disorders. [38]

(c) Other parties in interest:

The Shoshone and Bannock Tribes of Indians;

Fifth Count

(a) Ninip Toane—Funeral Expenses:

\$145.00 to McCann Undertaking Par-
lor paid by Estate of Helen
Poorahrah Toane\$ 22.50
and by the Estate of Ninip
Toane 122.50

\$150.00 for beef, one owned by Ninip Toane
Estate, value, \$75.00, one owned by Bill
Edmo, value \$75.00, both slaughtered
under Agency permit.

\$79.00 for clothing, as follows:

Moccasins	\$ 2.00
Buckskin vest	6.00
Silk shirt	4.00
Buckskin pants	12.00
Beaded necktie	1.50
Silk scarf	3.50
10 silk scarves	30.00
Misc.—mourners	20.00

\$79.00

paid for in equal parts by Annie Elk
Edmo, Irwin Toane, Toane, and Pansy
Edmo;

\$63.28 for groceries, purchased from Safe-
way Store, Inc., Pocatello, Idaho
paid in equal parts by Annie Elk Edmo,
Irwin Toane, Toane, and Pansy Edmo.

(b) Other damages: Loss of companionship; future earnings; loss of support.

(c) Basis of claim for \$25,000.00: Loss of companionship; future support and maintenance.

(d) Parties in interest: The Shoshone and Bannock Tribes of Indians; Irwin Toane, son, Fort Hall, Idaho; Toane, his father, Pansy A. Edmo, his sister, both of Wind River Agency, Ft. Washakie, Wyoming; [39]

Sixth Count

(a) Helen Toane—Funeral Expenses:

\$145.00 to McCann Undertaking Parlor paid by Estate of Helen Poorahrah Toane	\$ 22.50
and by the Estate of Ninip Toane	122.50

\$150.00 for beef, one owned by Ninip Toane Estate, value, \$75.00, one owned by Bill Edmo, value \$75.00, both slaughtered under Agency permit.

\$79.00 for clothing, as follows:

Moccasins	\$ 2.00
Buckskin vest	6.00
Silk shirt	4.00
Buckskin pants	12.00
Beaded necktie	1.50
Silk scarf	3.50
10 silk scarves	30.00
Misc.—mourners	20.00

\$79.00

paid for in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

\$63.28 for groceries, purchased from Safeway Store, Inc., Pocatello, Idaho
paid in equal parts by Annie Elk Edmo, Irwin Toane, Toane, and Pansy Edmo.

(b) Other damages: Loss of companionship; future earnings; loss of support.

(c) Basis of claim for \$25,000.00: Loss of companionship; future support and maintenance.

(d) Parties in interest: The Shoshone and Bannock Tribes; Adelia Toomuzzo Weiser, mother, Clinton Bear, Lilly Use Nagitsy, Mrs. John Nena Tendoy, half brothers and half sisters.

Seventh Count

(a) Frank Poewe—Expenses: Medical and Hospital, Dr. W. L. Olsen, \$42.40; Fort Hall Agency Hospital, \$69.30; [40] liability of \$220.00 to Lamar Pokibro for truck damaged; dates October 29, 1941 to November 24, 1941.

(b) Basis of claim for \$25,000.00: Pain and suffering physically and mentally; total and permanent disability; damage to capacity to work; loss of earnings; mental anguish; worsening of existing diseases; nervousness and nervous disorders.

(c) Other parties in interest: The Shoshone and Bannock Tribes;

JOHN A. CARVER

United States Attorney for
the District of Idaho

E. H. CASTERLIN

Ass't U. S. Attorney for the
District of Idaho

PAUL S. BOYD

Assistant U. S. Attorney for
the District of Idaho. [41]

EXHIBIT A

Shoshone and Bannack Indians

June 5, 1888—Referred to the House Calendar and
Ordered to be printed.

Mr. Perkins, from the Committee on Indian Affairs, submitted the following

Report

(To accompany bill H.R. 8662)

The Committee on Indian Affairs, to whom was referred the bill (H.R. 8662) to accept and ratify an agreement made with the Shoshone and Bannack Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purpose of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes, has carefully considered the provisions of

the bill, and recommend that it do pass, and submit the following report:

This bill was drawn in the Interior Department and is intended to fully cover and protect the interests of the Indians concerned and to provide room for railroad shops and a town-site, imperatively demanded by the necessity of the case, as set forth in the following extracts from a letter from the Honorable Secretary of the Interior, dated February 4, 1888:

(1) The Utah and Northern and Oregon Short Line Railroads cross each other and form a junction at a point within the boundaries of the reservation known as Pocatello Station, where a settlement has gradually grown up, composed mainly of employees of said railroads, with their families, together with other people drawn thereto, for whom sufficient land is represented to be absolutely needed for [42] swelling and for other purposes, to avoid the conflicts and troubles with the Indians arising from trespass upon the reservation; and,

(2) To ascertain and fix the compensation that should be paid to the Indians for land occupied by the Utah and Northern Railway Company as right of way, station grounds, etc., upon the reservation for its line of road, running north and south, already constructed and in operation. The right of way of the Utah and Northern Railway Company through the reservation, granted by the Act of July 3, 1882 (22 Stat. 148), for its Oregon branch running east and west, reported as subsequently assigned to the Oregon Short Line Rail-

way Company, is 100 feet wide, except at Pocatello Station, where it is 200 feet wide with an additional tract at that point comprising 30.45 acres for station purposes, making a total of about 772 acres, for which it was required to pay \$6,000, being at the rate of about \$7.77 per acre.

Under the law granting the right of way (200 feet wide) to the Utah and Northern Railway Company through the public lands (17 Stats., 612), as subsequently amended (20 Stats., 241), that corporation filed in the Department a series of fifteen maps of definite location of its road, eleven of which were approved March 6, 1882; the other four, showing the line of the road through the Fort Hall Reservation, were disapproved March 27, 1882, for the reason that the law granting right of way through the public domain did not entitle it to go through the Indian reservation, which is not public lands within the meaning of the act, and, further, that the consent of the Indians had not been formally obtained, and no compensation had been made to them for the land occupied, the road having already been constructed. A detailed history of this matter is set out in a message sent by you to Congress on the subject December 21, 1885, and printed in Senate Ex. Doc. No. 20, Forty-ninth Congress, first session.

* * * * *

As the embarrassments of the situation, resulting from the rapid growth of population of the town within the limits of the reservation and upon the land of the Indians, were daily increasing, the

Department in order to place the matter in shape for definite and speedy action by Congress, instructed one of the United States Indian inspectors and the United States Indian agent for the Fort Hall Indian Agency to confer with the Indians, examine the whole matter, and prepare a plan for the settlement of the questions involved. They called the Indians together in council, to whom, it is reported, they carefully and fully explained the matters, and negotiated with them the agreement herewith submitted, for which the Indians cede and relinquish to the United States, to be disposed of for town-site purposes, as Pocatello, or otherwise, as Congress may direct, for the benefit of the Indians, a tract of 1,840 acres of land, saving therefrom as much as has been heretofore and is by the present agreement relinquished to the United States for the use of the Utah and Northern and the Oregon Short Line railroads, all of which is more clearly shown in the accompanying plats.

The right of way to the Utah and Northern Railway Company through the reservation, north and south, provided for in the agreement, is 200 feet wide (the same as allowed to it through the public domain); this, with the rights of way 200 feet wide at Pocatello Station, already granted by law (22 Stat., 148) to the same company for its line running east and west, make a total width of 400 feet [43] as right of way for the two roads at that point, and the 30.45 acres already granted by law for station and depot purposes to one road, together with the 20 acres for like purposes provided

by this agreement for the other road, make a total of 50.45 acres for station and depot purposes for the two roads at their junction at Pocatello Station. The two roads at that point are constructed and run for some distance on the same road-bed, and use in part the same rails (one being a narrow-gauge road); in view of which it is considered by the Department that the right of way to the Utah and Northern Railway Company for its road running north and south should be there limited to 100 feet in width, making a total right of way 300 feet wide for both roads at Pocatello Station. The draught of the bill has been so framed as to provide for this limitation; this with the ample station and depot grounds there, would seem to afford sufficient land for the ordinary business of the two railroads, reported by the Commissioner of Railroads to be now under one and the same management—that of the Union Pacific Railway Company.

* * * * *

The draught of bill provides that the land ceded for the townsite (except the portions heretofore granted and those now proposed to be granted for railroad purposes) shall be surveyed and laid out in lots, appraised, and sold at public auction to the highest bidder, the proceeds to be deposited in the Treasury to the credit and for the benefit of the Indians. It also provides for access to and use by the citizens of the town in common with the Indians of the water from any river, creek, stream, or spring flowing through the reservation lands in the vicinity of the townsite.

The junction of these two railroads at Pocatello will, it is believed, become a town of considerable size and business, assisting and benefited by the development of the country. In this age of progress it is impossible, and it certainly is not desirable, to hinder the building of railroads by blocking the natural routes by great reservations for Indians or for any other purpose. Every part of our country must be brought in communication by the best means with every other part, and when the railroad companies ask nothing but the right of way they should have it in the interest of the people. By this Bill the Utah and Northern Railway Company are to pay at the rate of \$8.00 per acre for the right of

are

way and station grounds; 1,840 acres/to be surveyed and sold at not less than \$10 per lot, the money to be paid to the secretary of the Interior and to bear interest at 5 per cent per annum, and principal and interest to be expended according to his judgment [44] for the support and benefit of the said Indians. This land is now of no benefit to them, and the money for which it is to be sold can be most usefully and profitably invested for them in irrigating ditches, houses, cattle, wagons and implements, wheat, etc. The town, which will certainly grow up, will give them a convenient market for their farm productions and will exercise a most salutary and civilizing influence upon them. The rights of the settlers upon the reservation to be sold in lots, are fully protected by the bill.

The fifteenth section of the bill takes from the

railway company any inducement to "assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their remaining lands", or to "attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided."

It is provided that when any of the lands granted to the railway company for right of way and station grounds shall cease to be used for purposes specified, it shall revert to the Indians. All employees of the railway company living on the granted lands shall be subject to the provisions of the Indian intercourse laws and such rules and regulations as may be established, etc. Provision is made for indemnification by the railway company to the Indians for killing or maiming the Indians or their stock; also for fencing in the railway track where it runs through the improved lands of the Indians. We believe, in short, that every interest of the Indians has been jealously guarded and protected.

It is the settled policy of Congress to encourage the settlement of the lands in the Territories and the development of their vast natural resources, that not only homes for our people may be provided, but fields for the exercise of their industry, energy, enterprise, labor, and capital may be opened up. These [45] objects can best be accomplished by the building of lines of swift and easy communication and transportation by private capital, and therefore we think no great body of land should be reserved for any purpose to stand as an impediment to these great thoroughfares of the people.

[Title of District Court and Cause.]

ANSWER

Come now the defendants and for answer to the complaint filed herein, and each and every count thereof, admit, deny and allege as follows:

FIRST COUNT

First Defense

That said complaint and said first count fail to state a claim against the defendants, or either of them, upon which relief can be granted.

Second Defense

I.

Admit the allegations of paragraphs I, II, III, IV, V, and VI of said First Count.

II.

Answering paragraph VII of said First Count, the defendants admit on June 5, 1888 a report was made to Congress by the Committee on Indian Affairs, copy of which said report is attached to the complaint filed herein marked Exhibit A and made a part thereof; and defendants admit that said report was made in connection with a proposal then pending before the said Congress of the United States to provide for a right of way for railroad purposes vesting in the predecessor of [47] the defendant, Oregon Short Line Railroad Company, for a railroad operating in a general northerly and southerly direction across the Indian Reservation therein mentioned. Defendants deny each and

every other allegation contained and made in paragraph VII of said First Count.

III.

Answering paragraph VIII of said First Count, defendants admit that an agreement was made and entered into on the 27th day of May, 1887, between the United States of America and the Shoshone and Bannock tribes of Indians occupying the Fort Hall Indian Reservation in the Territory of Idaho, and that said agreement was ratified and embraced within an Act of Congress approved September 1, 1888, being 25 Stat. L. 452, which said Act of Congress contains, among other things, the portion thereof quoted in Paragraph VIII of said First Count. Defendants further admit that said Act of Congress was passed in furtherance of the purpose to permit and grant the right to the Utah and Northern Railway Company, its successors and assigns, to operate and maintain a line of railroad theretofore constructed over and across said Fort Hall Indian Reservation. Defendants deny each and every other allegation contained and made in paragraph VIII of said First Count.

IV.

Answering paragraph IX of said First Count, defendants admit that the defendant, Oregon Short Line Railroad Company, is the successor in interest of the Utah and Northern Railway Company and that at all times material in this action has by reason of the terms of the treaty and agreement with the

Indians and Act of Congress mentioned in said complaint, operated and maintained a railroad system, running railroad engines, cars and trains across the Fort Hall Indian [48] Reservation. Deny each and every allegation contained in paragraph IX not hereinbefore expressly admitted.

V.

Answering paragraph X of said First Count, these defendants admit that pursuant to said Act of Congress approved September 1, 1888, mentioned in said complaint, but not otherwise, the defendants Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company, made, executed and delivered to the United States a bond as required by said Act of Congress in the words and figures set forth in paragraph X of said complaint. The defendants deny each and every allegation contained and made in paragraph X of said First Count not hereinbefore expressly admitted or denied.

VI.

Answering paragraph XI of said First Count, these defendants admit that by reason of said Act of Congress and said bond they became obligated according to the terms thereof to pay such legal damages as might accrue to the members of the Shoshone and Bannock tribes of Indians by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, in the construction and operation of said railway. Said defendants deny that by reason of said bond and the law ap-

plicable thereto, or either thereof, they, or either of them, became liable or obligated to pay any sum on account of the killing or maiming of any Indian occurring without the fault or negligence of the said Utah and Northern Railway Company or the defendant, Oregon Short Line Railroad Company, successor thereto, or damages for injuries which were not the proximate or natural result or consequence of the operation of its trains or engines within the limits of said Indian Reservation. Deny [49] each and every allegation contained and made in said paragraph XI of said First Count not hereinbefore expressly admitted or denied.

VII.

Answering paragraph XII of said first count, defendants admit that on the 29th day of October, 1941, at a point where said railroad crosses what is known as the school railroad crossing between the county road and U. S. Highway No. 91, within the West Half of the Northeast Quarter of the Southeast Quarter of Section 2, Township 5 South, Range 34 E.B.M., on the Fort Hall Indian Reservation in Bingham County, State and District of Idaho, a locomotive engine operated by the Union Pacific Railroad Company upon said line of railroad collided with an automobile occupied by Ninip Toane, Helen Toane, and Frank Pooewe, who were then and there rightfully on said Fort Hall Indian Reservation, but deny that said Indians, or any of them, were rightfully upon said railroad crossing at the time and place of their entry thereon immediately

in front of and in close proximity to the locomotive engine then and there in plain sight and hearing of each and every of said Indians. Admit that Ninip Toane and Helen Toane sustained serious injuries from which they died, and that Frank Pooewe sustained a bruise on his head and a fractured rib, resulting in temporary, but not great suffering, and brief temporary disability. These defendants have not knowledge or information sufficient to form a belief as to whether either, all, or any of said Indians were members of the Shoshone and Bannock Tribes of Indians, or either of said tribes, and upon that ground deny each and every of said allegation, and each and every allegation contained and made in paragraph XII of said First Count not hereinbefore expressly admitted or denied. [50]

VIII.

Answering paragraph XIII of said First Count, defendants admit that they have refused to make any settlement or pay any sum on account of the death of, or injury to, any of the Indians described in said complaint, but deny that any obligations were or have been incurred by the defendants, or either of them, under said bond and said Act of Congress, or either thereof, on account of the death of or injury to any of said Indians. Defendants deny that funeral expenses were incurred for the burial of Ninip Toane and Helen Toane amounting to approximately the sum of \$2,000.00, or any other sum in excess of \$145.00. Defendants deny each

and every other allegation contained and made in paragraph XIII of said First Count, and each and every other allegation contained and made in said First Count of said complaint not hereinbefore expressly admitted or denied, and deny each and every other allegation contained and made in all or any part of said complaint, and of each and every count thereof, not hereinbefore expressly admitted or denied.

Third Defense

IX.

Further answering said First Count, and as a third separate and distinct defense thereto, these defendants allege that the plaintiff herein seeks recovery solely upon the statute, 25 Stat. L. 452, and the bond given pursuant thereto; that said statute does not create a right of action for the death of a human being, or provide any measure of damages therefor; that said statute is merely one providing for the giving of a bond to secure the payment to the United States, for the use and benefit of members of the Shoshone and Bannock Tribes on the Fort Hall Indian Reservation of damages which may [51] lawfully accrue to them in consequence of the violation of their legal rights by the Utah and Northern Railway Company, or by the Oregon Short Line Railroad Company, as its successors, and not otherwise; that the bond sued upon is not, and can not lawfully be held to be, broader than the statute, or to create a liability or obligation broader than that provided by statute; that said statute and bond do not create liability without fault or negligence

or proximate cause, and that to render judgment in favor of the plaintiff and against the defendants, or either of them, without reference to fault or negligence or proximate cause, would deprive these defendants, and each of them, of property without due process of law, contrary to and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

Fourth Defense

X.

Further answering said First Count, and as a fourth separate and distinct defense thereto, these defendants allege that at the time and place of the collision described in the complaint, the engine and cars described in said complaint were approaching the highway crossing therein described, on a track that was straight and level, with the headlight of the engine burning brightly, and the bell on the engine ringing continuously, and the steam whistle of said engine being sounded, and said train and engine and the headlight thereof were in plain view of the Indians described in said complaint continuously for at least three quarters of a mile before the engine reached the highway crossing, and could have been clearly seen by all of said Indians before they drove upon said railroad track and in the path of said approaching train if they had looked while in a safe place and at a safe distance, or at any time and point after they were within two hundred feet of said railroad crossing, as it was their duty to do, and likewise [52] the steam whistle and bell of said

engine could have been clearly heard by said Indians before they drove upon said track or within two hundred feet, or any intermediate point, before entering upon said track if they had listened, as it was their duty to do, but that said Indians, well knowing that they were approaching and about to enter upon said railroad crossing, neither looked or listened for said or any approaching train, but drove upon said railroad track and stopped the vehicle in which they were riding when said locomotive engine was so close to said highway crossing that those in charge of said train and engine could not avoid colliding therewith, and that said collision was due solely to the aforesaid acts and omissions of said Indians, which said acts and omissions were the sole proximate cause thereof.

SECOND COUNT

First Defense

That said Second Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.

Second Defense

I.

The defendants admit the allegations contained in said Second Count by reference to the First Count of said complaint to the same extent and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XII and XIII of said Second Count to the same extent, and

no further, than the admissions contained in paragraphs VII and VIII of their answer to the First Count, and deny each and every allegation contained and made in said Second Count not hereinbefore expressly admitted or denied. [53]

Third Defense

II.

For a third defense to said Second Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph IX of its answer to the First Count of said complaint, designated as Third Defense thereto.

Fourth Defense

III.

For a fourth defense to said Second Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph X of its answer to the First Count of said complaint, designated as Fourth Defense thereto.

THIRD COUNT

First Defense

That said Third Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.

Second Defense

I.

The defendants admit the allegations contained in said second count by reference to the First Count of said complaint to the same extent, and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XII and XIII of said Third Count to the same extent, and no further, than the admissions contained in paragraphs VII and VIII of their answer to the First Count, and deny each and every allegation contained and made in said Third Count not hereinbefore expressly admitted or denied. [54]

Third Defense

II.

For a Third Defense to said Third Count the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph IX of its answer to the First Count of said complaint, designated as Third Defense thereto.

Fourth Defense

III.

For a fourth defense to said Third Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph X of its answer to the First Count of said complaint, designated as Fourth Defense thereto.

FOURTH COUNT

First Defense

That said Fourth Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.

Second Defense

I.

The defendants admit the allegations contained in said Fourth Count by reference to the First Count of said complaint to the same extent, and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraph XII and XIII of said Fourth Count to the same extent, and no further, than the admissions contained in paragraphs VII and VIII of their answer to the First Count, and deny each and every allegation contained and made in said Fourth Count not hereinbefore expressly admitted or denied. [55]

Third Defense

II.

For a Third Defense to said Fourth Count the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph IX of their answer to the First Count of said complaint, designated as Third Defense thereto.

Fourth Defense

III.

For a fourth defense to said Fourth Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every of the allegations contained in paragraph X of their answer to the First Count of said complaint, designated as Fourth Defense thereto.

FIFTH COUNT

First Defense

That said Fifth Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.

Second Defense

I.

The defendants admit the allegations contained in said Fifth Count by reference to the First Count of said complaint to the same extent and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XI and XII of said Fifth Count. Answering paragraph XIII of said Fifth Count the defendants admit that the defendant Oregon Short Line Railroad Company executed a bond by which it obligated itself, but not its successors in interest, in the manner and form set forth in paragraph X of the First Count of said complaint; denies each and every other allegation contained in paragraph XIII of said Fifth Count [56] and denies each and every allegation contained in paragraph XIV of said Fifth Count.

The defendants admit the allegations contained in paragraphs XV and XVI of said Fifth Count to the same extent, and no further, than the admissions contained in paragraphs VII and VIII or their answer to the First Count.

Third Defense

II.

For a third defense to said Fifth Count, the defendants herein adopt by reference as though the same were fully restated and repeated herein, each and every allegation contained in paragraph IX of their answer to the First Count of said complaint, designated as Third Defense thereto.

Fourth Defense

III.

For a fourth defense to said Fifth Count, the defendants herein adopt by reference as though the same were fully restated and repeated herein, each and every allegation contained in paragraph X of their answer to the First Count, designated as Fourth Defense thereto.

SIXTH COUNT

First Defense

That said Sixth Count fails to state a claim against the defendants, or either of them, upon which relief can be granted.

Second Defense

I.

The defendants admit the allegations contained in said Sixth Count by reference to the First Count of said complaint to the same extent and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XI and XII of said Sixth Count. Answering paragraph XIII of said Sixth Count, the [57] defendants admit that the defendant Oregon Short Line Railroad Company executed a bond by which it obligated itself, but not its successors in interest, in the manner and form set forth in paragraph X of the First Count of said complaint; denies each and every other allegation contained and made in paragraph XIII of said Sixth Count, and denies each and every allegation contained and made in paragraph XIV of said Sixth Count.

The defendants admit the allegations contained in paragraphs XV and XVI of said Sixth Count to the same extent, and no further, than the admissions contained in paragraphs VII and VIII of their answer to the First Count.

Third Defense

II.

For a third defense to said Sixth Count the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every allegation contained in paragraph IX of their answer to the First Count of said complaint, designated as a Third Defense thereto.

Fourth Defense

III.

For a fourth defense to said Sixth Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every allegation contained in paragraph X of their answer to the First Count of said complaint, designated as Fourth Defense thereto.

SEVENTH COUNT

First Defense

That said Seventh Count fails to state a claim against the defendants, or either of them, upon which relief can be granted. [58]

Second Defense

I.

The defendants admit the allegations contained in said Seventh Count by reference to the First Count of said complaint to the same extent and no further, or otherwise, than admitted in the answer to the First Count hereinbefore stated, and admit the allegations contained in paragraphs XI and XII of said Seventh Count. Answering paragraph XIII of said Seventh Count, the defendants admit that the defendant Oregon Short Line Railroad Company executed a bond by which it obligated itself, but not its successors in interest, in the manner and form set forth in paragraph X of the First Count of said complaint; denies each and every other allegation contained in paragraph XIII of said Seventh Count, and denies each and

every allegation contained in paragraph XIV of said Seventh Count.

The defendants admit the allegations contained in paragraphs XV and XVI of said Seventh Count to the same extent, and no further than the admissions contained in paragraphs VII and VIII of their answer to the First Count.

Third Defense

II.

For a third defense to said Seventh Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every allegation contained in paragraph IX of their answer to the First Count of said complaint, designated as Third Defense thereto.

Fourth Defense

For a fourth defense to said Seventh Count, the defendants herein adopt by reference, as though the same were fully restated and repeated herein, each and every allegation contained in paragraph X of their answer to the First Count of said complaint, designated as Fourth Defense thereto. [59]

These defendants deny each and every allegation of each and every count of said complaint not hereinbefore expressly admitted or denied.

Wherefore, the defendants pray to be hence dismissed with their just costs and disbursements herein incurred.

GEO. H. SMITH,
H. B. THOMPSON,
L. H. ANDERSON,

Attorneys for Defendants.

By: H. B. THOMPSON.

Residence & P. O. Address,

Attorneys for Defendants:

GEO. H. SMITH,
Salt Lake City, Utah.

H. B. THOMPSON, and

L. H. ANDERSON,
Pocatello, Idaho.

(Affidavit of Mailing attached.)

[Endorsed]: Filed Oct. 2, 1942. [60]

[Title of District Court and Cause.]

MOTION TO STRIKE FROM ANSWER

Comes now the plaintiff and moves to strike from the answer of the defendants filed herein on October 2, 1943, as follows:

All of the third defense to the first count;

All of the fourth defense to the first count;

All of the third defense to the second count;

All of the fourth defense to the second count;

All of the third defense to the third count;

All of the fourth defense to the third count;

All of the third defense to the fourth count;
All of the fourth defense to the fourth count;
All of the third defense to the fifth count;
All of the fourth defense to the fifth count;
All of the third defense to the sixth count;
All of the fourth defense to the sixth count;
All of the third defense to the seventh count;
All of the fourth defense to the seventh count;

on the ground that the same are not and do not constitute any defense to plaintiff's complaint and the cause and causes of action therein stated, and any evidence offered in support thereof is incompetent, immaterial and irrelevant.

JOHN A. CARVER

United States Attorney for
the District of Idaho.

E. H. CASTERLIN

Assistant United States
Attorney for the District of
Idaho.

[Endorsed]: Filed Oct. 4, 1943. [61]

[Title of District Court and Cause.]

MOTION TO STRIKE

Come now the defendants, Oregon Short Line Railroad Company and Union Pacific Railroad Company, and move to strike from the complaint filed herein the following portions thereof, to-wit:

All of Paragraph XIII of the Fifth Count;

All of Paragraph XIII of the Sixth Count;

All of Paragraph XIII of the Seventh Count;

upon the ground that the same is redundant, immaterial and impertinent.

GEO. H. SMITH

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Defendants,
Oregon Short Line Railroad
Company and Union Pacific
Railroad Company.

Service and receipt of a copy of the foregoing Motion is hereby admitted this 15th day of October, 1943.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff

[Endorsed: Filed Oct. 15, 1943. [62]]

[Title of District Court and Cause.]

MOTION TO ELECT

Come now the defendants and move that the Court require the plaintiff to elect upon which of the numerous and conflicting counts set forth in the complaint filed herein it shall proceed upon the trial of this case to enforce the liability of the bondsmen, Saint Paul-Mercury Indemnity Company of St. Paul, on its bond set forth in paragraph X of the First Count of said complaint, and the corre-

sponding liability of the other two defendants based upon said bond and the provision therefor appearing in Section 14 of Act of Congress of September 1, 1888 set forth in paragraph VIII of the First Count of said complaint, and to strike from said complaint the several counts and portions thereof upon which said election shall not be based.

GEO. H. SMITH

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Defendants.

Service and receipt of a copy of the foregoing Motion to Elect is hereby admitted this 15th day of October, 1943.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff

[Endorsed]: Filed Oct. 15, 1943. [63]

[Title of District Court and Cause.]

VERDICT

We, the jury in the above entitled case, find for the plaintiff, and fix damages for the death of Ninip Toane in the sum of \$1250.00; and fix damages for the death of Helen Toane in the sum of \$1250.00; and fix damages for the maiming and injury to Frank Poewe in the sum of \$2000.00.

D. H. MANWARING

Foreman

[Endorsed]: Filed October 19, 1943. [64]

In the District Court of the United States, in and for
the District of Idaho, Eastern Division.

No. 1182

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE OREGON SHORT LINE RAILROAD, a
corporation,

SAINT PAUL-MERCURY INDEMNITY COM-
PANY OF ST. PAUL, a corporation, and

UNION PACIFIC RAILROAD COMPANY, a
corporation,

Defendants.

JUDGMENT ON VERDICT

This matter having come on regularly for trial to
a jury which has returned its verdict herein,

Now, therefore, it is ordered, adjudged, and de-
creed that plaintiff have and recover of and from
the said defendants, jointly and severally, the sum
of \$1250.00 damages for the death of Ninip Toane,
and the sum of \$1250.00 damages for the death of
Helen Toane, and the sum of \$2000.00 damages for
the maiming and injuring of Frank Poewe, together
with plaintiff's costs and disbursements incurred
herein assessed in the sum of \$90.80.

Witness, the Honorable Chase A. Clark, Judge of the above entitled Court and the seal thereof this 20th day of October, 1943.

[Seal]

W. D. McREYNOLDS

Clerk

[Endorsed]: Filed October 20, 1943. [65]

[Title of District Court and Cause.]

PETITION ON MOTION FOR JUDGMENT
NOTWITHSTANDING THE VERDICT,
AND, ALTERNATIVELY, FOR A NEW
TRIAL.

Come now the defendants and move the Court to set aside the verdict and judgment entered thereon and enter judgment in their favor notwithstanding the verdict in accordance with the motion made by the defendant for a directed verdict, and, in the event of the failure of the Court to grant said motion, for an order setting aside the verdict and judgment rendered herein and granting a new trial pursuant to Rule 50 of the Rules of Federal Procedure, and the Rules of this Court, on the following grounds:

I.

Insufficiency of the evidence to justify the decision, and that it is against law in this, to-wit:

(a) As stated in the defendants' motion for a directed verdict: that the collision and consequences thereof were not proximately caused by anything that the Railroad Company or its employes in the

operation of the train did or could have anticipated or avoided, but that the sole proximate cause was the act of the driver of the auto attempting to cross the track with a large load of long poles in the immediate presence of a rapidly approaching train, which train he could and should have seen if he had looked therefor, as he was bound to do, and could and should have heard the whistles and bell thereof if he listened therefor, as he was bound to do, and [66] seeing and hearing give precedence of passage to, and but for which the collision would not have occurred. That the collision was not the result of inevitable accident, because it was the duty of the driver to stop his auto and give precedence to the train, the headlights of which was in plain view and the signals of which were being sounded; on the contrary it was inevitable risk. And in addition thereto, that it appears from the evidence that Pooewe, the driver of the automobile, did not know of the approach of the engine or train until immediately before the collision, when Helen Toane apprized him of such fact, at which time the said automobile was on the track and he stalled his engine and was immediately struck by said locomotive.

(b) The evidence is wholly insufficient to support a verdict or judgment for \$1,250.00, or any other substantial amount on account of the death of Ninip Toane, for the reason that the total amount of provable or proven funeral expenses on account of both of the deceased Indians did not exceed \$500.00, of which not more than one half, or \$250.00, was chargeable to the death of Ninip Toane, and the

only other evidence as to damages relative to Ninip Toane was that of his father, who had for a considerable period of time lived apart from Ninip Toane, on an Indian Reservation in Wyoming, and who merely testified when asked what contributions Ninip Toane had made to him "very little", which testimony is insufficient to support an award of any damages, and there is no testimony or evidence that anyone else, Indian or otherwise, sustained any damages or pecuniary loss on account of the death of Ninip Toane, or that any damages accrued to any Indian on account thereof.

(c) The evidence is wholly insufficient to support a verdict or judgment for \$1,250.00 or any other substantial amount, on account of the death of Helen Toane, for the reason that the total amount of provable or proven funeral expenses incurred on account of the death of both of the deceased Indians did not exceed \$500.00, of which not more than one half, or \$250.00, was chargeable to the [67] death of Helen Toane, and the only other evidence as to damages relative to Helen Toane was that of her mother, who was a grown woman at the time of the Nez Perce War, in 1877, and who, if 20 years old in 1877, would now be 86 years old, with substantially no life expectancy, whose testimony would not support a finding of annual contributions from Helen Toane of any substantial or determinable amount, and in no event to exceed \$100.00 a year for two years of expectancy of life of the mother, Adelia Weiser, and there is no testimony or evidence that anyone else, Indian or otherwise, sustained any

damages or pecuniary loss on account of the death of Helen Toane, or that any damages accrued to any Indian on account thereof.

(d) That the evidence is insufficient to sustain any damages for funeral expenses, because such expenditures were a proper charge of the estate of said deceased Indians, and no damages accrued to anyone on account thereof.

(e) That the evidence is insufficient to support a finding that any of the Indians described in the complaint were killed or injured in consequence of the fault or negligence of any of the defendants, or their agents or servants, and accordingly no damages accrued to anyone against any of the defendants on consequence of the collision described in the complaint.

II.

Excessive damages appearing to have been given under the influence of passion and prejudice, for the reasons hereinbefore set forth under the heading of 'insufficiency of the evidence' paragraph I, subdivisions (b) and (c) thereof.

III.

Errors in law occurring at the trial as follows:

(a) The court erred in overruling the defendants' objection to the admission of evidence of funeral expenses, for the reason that said expenses were a proper charge of and were paid out of the estate of the deceased Indians, and no damages accrued to any Indian [68] or to the tribe on account thereof.

(b) The court erred in denying the defendants' motion for judgment in favor of said defendants,

for the reasons stated in said motion, and for the reasons hereinbefore stated in paragraph I, subdivision (a) hereof.

(c) The court erred in refusing and denying the defendants' requested instruction numbered one, to the effect that damages do not accrue to anyone for the killing or injuring of a person without negligence or other fault, and that the jury should accordingly render a verdict in favor of the defendants.

(d) The court erred in refusing and denying the defendants' requested instruction numbered 7.

(e) The court erred in refusing and denying the defendants' requested instruction numbered 8.

(f) The court erred in refusing and denying the defendants' requested instruction numbered 9.

(g) The court erred in charging and instructing the jury that the defendants were bound to compensate or indemnify the plaintiff, or those on whose behalf the suit was brought, for loss or injury resulting from inevitable and unavoidable causes.

Said motion is based and will be made upon all the records, files, pleadings and proceedings in said action, including the instructions given, and the instructions requested by the defendants and by the court refused, and upon the minutes of the court as stated and defined in Rule 50 of the Rules of Practice of this Court, which embraces the Reporter's transcript of his notes in said cause.

GEO. H. SMITH

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Defendants

Service and receipt of a copy of the foregoing Petition is hereby admitted this 23rd day of October, 1943.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff

[Endorsed]: Filed Oct. 23, 1943. [69]

[Title of District Court and Cause.]

ORDER

Motion for judgment notwithstanding the verdict, and, alternatively, for a new trial, having been presented by counsel for the defendants, and the matter thereafter set down for hearing. After having heard argument of counsel for both parties and having fully considered the same, and being advised;

It is ordered that the said motions be and they are hereby denied.

Dated: November 18, 1943.

CHASE A. CLARK

United States District Judge

[Endorsed]: Filed Nov. 18, 1943. [70]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Oregon Short Line Railroad Company, a corporation, Saint Paul-

Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, the above named defendants, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment, and the whole thereof, made and entered in the above entitled court and cause on the 20th day of October, 1943, which said judgment was in favor of the plaintiff herein and against the defendants.

Dated this 3rd day of January, 1944.

H. B. THOMPSON

Attorney for Defendants,
Residing at Salt Lake City,
Utah

L. H. ANDERSON

Attorney for Defendants,
Residing at Pocatello, Idaho

[Endorsed]: Filed January 3, 1944. [71]

[Title of District Court and Cause.]

PETITION FOR APPROVAL OF SUPERSEDEAS AND STAY ON APPEAL

Come now the Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, the above named defendants-appellants, and represent as follows:

That judgment was entered in the above entitled court and cause on the 20th day of October, 1943,

in favor of the plaintiff and against the defendants, jointly and severally, for the total sum of \$4,500.00 and costs of suit taxed at \$90.80; that said defendants have appealed from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit and desire the court to fix the amount of a supersedeas bond, approve the form thereof, and also approve the Continental Casualty Company, a corporation, as surety, and thereupon order a stay of proceedings according to law.

Now, therefore, petitioners pray that the court fix the amount of said supersedeas bond, approve the bond tendered herewith, and the surety thereon, and order a stay according to law.

Dated this 3rd day of January, 1944.

H. B. THOMPSON

Attorney for Defendants,
Residing at Salt Lake City,
Utah

L. H. ANDERSON

Attorney for Defendants,
Residing at Pocatello, Idaho

[Endorsed]: Filed January 3, 1944. [72]

[Title of District Court and Cause.]

ORDER APPROVING BOND AND GRANTING
A STAY OF EXECUTION

The defendants, Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity

Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, having this day filed their Notice of Appeal from the judgment rendered in the above entitled cause in favor of the plaintiff and against the defendants jointly and severally to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed its petition for an order fixing the amount of a supersedeas bond and approving the bond tendered by said appellants and the surety executing the same, and granting said stay of proceedings.

Now, therefore, it is hereby ordered that the amount of said supersedeas bond be fixed in the sum of Five Thousand (\$5,000.00) and No/100ths Dollars, and the bond tendered by the said defendants in said sum with the Continental Casualty Company, a corporation, as surety, be and the same is hereby in all respects approved and that all proceedings herein for the collection of said judgment be and they are hereby stayed according to law.

Dated, this 3rd day of January, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed January 3, 1944. [73]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, that we, Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a

corporation, and Union Pacific Railroad Company, a corporation, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Dollars (\$5,000.00), lawful money of the United States of America, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of January, 1944.

Whereas, lately in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in said court between United States of America, as plaintiff, and the Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, as defendants, a judgment was rendered in favor of the plaintiff and against said defendants in [74] the total sum of Four Thousand Five Hundred (\$4,500.00) Dollars, and bearing interest at the rate of 6% per annum from the date thereof, to-wit: on the 20th day of October, 1943, with costs amounting to the sum of \$90.80, and said Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corpo-

ration, and Union Pacific Railroad Company, a corporation, having filed in said court a Notice of Appeal to reverse said judgment in the aforesaid suit on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be held at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, shall prosecute said appeal to effect, and satisfy the said judgment in full, together with costs, interest and damages for delay if for any reason the appeal is dismissed or the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award against it, then the above obligation to be void; otherwise to remain in full force and virtue.

OREGON SHORT LINE RAIL-
ROAD COMPANY, a corpora-
tion,

SAINT PAUL-MERCURY IN-
DEMNITY COMPANY OF
ST. PAUL, a corporation,

UNION PACIFIC RAILROAD
COMPANY, a corporation,

By L. H. ANDERSON

One of Their Attorneys of
Record, Residing at
Pocatello, Idaho,
Principal

[Seal] CONTINENTAL CASUALTY

COMPANY, a corporation,

By A. B. CHASE

Its Attorney-in-Fact

Surety

A. B. CHASE

Resident Agent [75]

The foregoing Bond is approved as to sufficiency, form and surety, and is allowed as a Supersedeas this 3rd day of January, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed January 3, 1944. [76]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as surety, are held and firmly bound to United States of America, the plaintiff and appellee in the above entitled cause, in the full and just sum

of Two Hundred Fifty (\$250.00) Dollars, to which payment well and truly to be made we bind ourselves and our and each of our successors or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of January, 1944.

Whereas, on the 20th day of October, 1943, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that court, wherein United States of America was plaintiff, and the Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad [79] Company, a corporation, were defendants, a judgment was rendered against said defendants jointly and severally in the total sum of Four Thousand Five Hundred Dollars (\$4,500.00), with interest and costs, and said defendants having filed in the office of the Clerk of said District Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, the condition of this obligation is such, that if said Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, the appellants, shall prosecute said appeal and pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the

judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

OREGON SHORT LINE RAIL-
ROAD COMPANY, a corpora-
tion,

SAINT PAUL-MERCURY IN-
DEMNITY COMPANY OF

ST. PAUL, a corporation,
UNION PACIFIC RAILROAD
COMPANY, a corporation,

By L. H. ANDERSON,

One of its attorneys of Rec-
ord, Residing at Pocatello,
Idaho.

Principal.

[Seal] CONTINENTAL CASUALTY
COMPANY, a corporation,

By A. B. CHASE,

Its Attorney-in-Fact,
Surety.

A. B. CHASE,
Resident Agent. [80]

CONTINENTAL CASUALTY COMPANY
CHICAGO

CERTIFICATE OF AUTHORITY INDIVID-
UAL ATTORNEY-IN-FACT

Know All Men By These Presents, That the Con-
tinental Casualty Company, a corporation duly or-

ganized under the laws of the State of Indiana, and having its general office in the City of Chicago, and State of Illinois, hath made, constituted and appointed, and does by these presents make, constitute and appoint A. B. Chase of Pocatello, Idaho its true and lawful Attorney-in-Fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature as follows: Any and all Fidelity and Surety bonds in penalty not exceeding Five Hundred Thousand Dollars (\$500,000.00) behalf Union Pacific Railroad Company or its subsidiary or affiliated companies, and to bind the Continental Casualty Company thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of the Continental Casualty Company and all the acts of said Attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law adopted by the Board of Directors of the Company at a meeting duly called and held on the 6th day of January, 1937.

“Article XI Surety Bonds and Undertakings.

Section 2. Appointment of Attorney-in-Fact. The President or any Vice President may, from time to time, appoint by written certificates Attorneys-in-Fact to act in behalf of the Company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such Attorneys-in-

Fact, subject to the limitations set forth in their respective certificates of authority shall have full power to bind the Company by their signature and execution of any such instrument and to attach the seal of the Company thereto. The President or any Vice President or the Board of Directors may at any time revoke all power and authority previously given to any Attorney-in-Fact."

In Witness Whereof, The Continental Casualty Company has caused these presents to be signed by its Vice President and its corporate seal to be hereto affixed this 17th day of July, 1941.

[Seal]

CONTINENTAL CASUALTY
COMPANY,

By ROY TUCHBREITER,
Vice President. [81]

State of Illinois, County of Cook—ss:

On this 17th day of July, 1941, before me personally came Roy Tuchbreiter to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Chicago, State of Illinois; that he is a Vice President of The Continental Casualty Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority, and ac-

knowledge same to be the act and deed of said corporation.

[Notarial Seal] H. McCRILLUS,

Notary Public.

My Commission expires April 9, 1944.

CERTIFICATE

I, A. B. Hvale, Assistant Secretary of the Continental Casualty Company, do hereby certify that the attached Power of Attorney dated July 17, 1941 in behalf of A. B. Chase is a true and correct copy and that same is still in force.

In testimony whereof I have hereunto subscribed my name and affixed the corporate seal of the said Company this day of 19....

A. B. HVALE,

Assistant Secretary.

[Endorsed]: Filed January 3, 1944. [82]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

This matter was tried at Pocatello, Idaho, on October 18, 1943, before the Honorable Chase A. Clark, United States District Judge, sitting with a jury.

APPEARANCES

John A. Carver, United States District Attorney,
Boise, Idaho

E. H. Casterlin, Assistant U. S. Dist. Attorney,
Boise, Idaho

R. W. Beckwith, Assistant U. S. Dist. Attorney,
Boise, Idaho

Attorneys for the Plaintiff,

H. B. Thompson, Pocatello, Idaho

L. H. Anderson, Pocatello, Idaho

Attorneys for the Defendants. [83]

October 18, 1943

10 o'clock A. M.

The Court: Now, on the motion to strike paragraph thirteen of the fifth, sixth and seventh counts of the complaint. There is also a motion to elect. I think I will sustain the motion to elect and require the Government to elect before ruling on any of the other motions that are before the Court at this time.

Mr. Casterlin: The Government will elect to proceed on counts 1, 2, 3 and 4.

Mr. Thompson: And the others, I understand, are stricken?

The Court: Yes. Then they are disposed of now and will not be before the Court so that it will not be necessary to pass upon the other motion in reference to counts that are not before the Court. Counts 1, 2, 3 and 4 are before the Court. The motion to strike the third defense will be granted. As to the fourth defense, this presents a more serious problem. The Ninth Circuit Court of Appeals has said that a complaint based upon the statute did not need to charge negligence against the Railroad Company, and holds that negligence on the part of the Railroad Company does not enter into the right of recovery by the Indians.

From a careful reading of this decision I feel sure the Circuit Court has not passed upon the Fourth defense in any way, as set forth in the defendant's answer. [86]

The statute and bond in question are contracts between the Government and the Railroad. Any breach on the part of the railroad must necessarily, in my opinion, be a breach such as reasonably could be considered as arising from the contract. There are so many examples where loss of life or destruction of property would arise under circumstances that certainly were not contemplated when the statute was passed and the bond given.

It is urged that there is only one issue here and that is the question of damages.

For instance, if an Indian decided to commit suicide and threw himself in front of an approaching train and was killed, or if an Indian decided to wreck a train and placed his automobile on the

track for that purpose, or, as suggested by the defendant, if he drove deliberately on the railroad track immediately in front of an approaching train where he had a plain and unobstructed view and the signals were being sounded, and a great many other examples which might be given,—could it be said that the railroad Company would have no defense. It appears to me that proximate cause should be a defense in this action and I feel sure that after a careful study of the Ninth Circuit Court's opinion, they have not decided this question.

This Court is bound by the decision of the Circuit Court of Appeals and I wish to adhere to their ruling [87] to the letter, but the question before me on this Fourth defense, I am sure, was not in contemplation at the time that decision was rendered, nor have they passed upon this question in any way. So for the present at least I will deny the motion to strike the Fourth defense.

Mr. Casterlin: I think that disposes of everything that is before the Court now.

The Court: Yes, as to the first four counts. Possibly there was a motion to dismiss as to the first defense, but I think that was disposed of, if there was such a motion, however, I will overrule it to make the record clear at this time.

(Opening Statement of Plaintiff.)

The Court: Before we start on the testimony we will take a short recess. (Admonition to the jury and a ten minute recess ordered.)

11:15 A. M. October 18, 1943

The Court: You may call your first witness:

LEON M. HENRIE

being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. State your name?

A. Leon M. Henrie.

Q. And your residence. [88]

A. Fort Hall, Idaho.

Q. Your occupation or business.

A. Chief Clerk of the Fort Hall Indian agency and acting superintendent.

Q. Mr. Henrie, do you know whether or not Ninip Toane and Helen Toane are Indians?

A. Yes sir.

Q. Are they? A. They are.

Q. Do your records disclose to what tribe or tribes they belong, Mr. Henrie?

A. Yes, I have the records here.

Q. And to what tribe did Ninip Toane belong?

A. The Shoshone-Bannock tribe.

Q. When was he born?

A. 1885 I believe.

Q. Is that what your records show?

A. Yes sir.

Q. Does it show the month and date of his birth? A. I don't have the month or date.

Q. Just the year. A. Yes, just the year.

Q. Did Ninip Toane have an allotment number?

A. Yes sir.

Q. What was that number? A. 1592. [89]

Q. What does that signify?

(Testimony of Leon M. Henrie.)

A. That signifies that he was allotted a tract of land within the Indian reservation.

Q. What does the word allotted mean?

A. It means that he was allotted a parcel of land.

Q. That was true during the month of October 1941?

A. Yes.

Q. And was he under the jurisdiction of the Superintendent of the Fort Hall Indian Reservation?

A. Yes sir.

Q. Does that record show to what tribe Helen Toane belonged?

A. The Shoshone-Bannock tribe.

Q. When was she born?

A. 1885 also.

Q. Does she have an allotment?

A. Yes sir.

Q. What was her allotment number?

A. 815.

Q. Was she under the supervision of the Fort Hall Indian Agency in October 1941?

A. Yes sir.

Q. Does your record carry the name of Frank Poewee?

A. Yes sir.

Q. Does it show to what Tribe or Tribes he belongs?

A. The Shoshone-Bannock tribe.

Q. When was he born? [90]

A. January 15, 1914.

Q. Did he have a number.

A. He had. He had an identification number, but not an allotment number, which I have here. His number was 174, I am not sure that is what

(Testimony of Leon M. Henrie.)

you want. That number 174 is just the file number and used as an identification number as well.

Q. Do you have the census book with you.

A. I didn't bring that in. I brought the individual files, I thought they were a little easier to carry. I don't see any other number except that one number 174.

Q. I want his annuity number.

A. I may be able to find it. I will look.

Q. Is Frank Poewee carried on the census roll of the Fort Hall Agency? A. Yes sir.

Q. Was he in October 1941? A. Yes sir.

Q. Do you know where he lived during the month of October 1941?

A. On the reservation, I am quite certain.

Q. Do you know where he lived?

A. No sir.

Q. Do you know where Ninip Toane and Helen Toane lived in October 1941? A. No. [91]

Q. Do you know where their lands are situated?

A. Our records would show that but I don't know off-hand.

Q. Did you look to see where it was located?

A. No sir.

Q. Have you been to their places?

A. No sir.

Q. Do you know where Tom English lives?

A. No sir.

Q. Do you know where Sam Tendoy lives?

A. No sir.

Q. Do you know whether Helen Toane and Ninip

(Testimony of Leon M. Henrie.)

Toane were restricted or unrestricted Indians in October 1941? A. Restricted Indians.

Q. Do you know anything about the funeral of Ninip Toane and Helen Toane?

A. No sir, I wouldn't know that.

Q. Or the expenditures on account of that?

A. No sir.

Q. You were served with a subpoena which required you to bring with you the records showing the property of Helen Toane and Ninip Toane and Frank Poewee during the month of October 1941. Do you have that record with you?

A. Yes, I think so. I have their allotments, that is, of Ninip Toane and Helen Toane. I can tell you what those [92] allotments were, would you like the legal descriptions?

Q. Yes.

A. Ninip Toane was the east half of the southeast quarter of the Northeast quarter of section 16, Township five South Range 34 east Boise Meridian.

Q. Does that land lie within the exterior boundaries of the Fort Hall reservation?

A. No, it is within the Interior boundary of the reservation.

Q. Well, does that land lie within the Fort Hall Reservation?

A. Yes, and lots 3 and 4 and then also the south half of the northwest quarter of section 4 township 7 south range 32 and the entire allotment contains 173.24 acres.

(Testimony of Leon M. Henrie.)

Q. Does that lie within the exterior boundaries of the Fort Hall reservation? A. Yes sir.

Q. That is all the Ninip Toane allotment?

A. Yes sir.

Q. Now the Helen Toane Allotment?

A. The east half of the Northeast quarter of the Southeast quarter of Section 16, township 3 south Range 35 E B M and the southeast quarter of Section 25 Township 2 South Range 37 E B M.

Q. Do you know whether that land lies within the exterior boundaries of the Fort Hall Indian Reservation? A. Yes sir.

Q. Does it? [93] A. Yes sir.

Q. Does Frank Poewee have land allotted to him? A. No sir.

Q. During the recess if you will find the annuity number of Frank Poewee and have it with you after the recess. A. Yes sir.

Q. Do you have with you the record of the hospitalization of Frank Poewee in the hospital on the reservation? A. Yes sir, I have that.

Q. Will you get that?

A. Yes sir, and I will get that annuity number.

Q. Will you get that hospitalization record that you are looking for now?

A. Yes sir, I have it.

The Court: What do you want him to do with it?

Q. Will you hand it to me?

A. I don't have it right now, but I am sure that I ran across it when I was getting these files ready to bring in here.

(Testimony of Leon M. Henrie.)

The Court: We will recess until 1:30 and the witness can get what you want during that time.

(Admonition to the jury.)

1:30 P. M. October 18, 1943

LEON M. HENRIE,

recalled. [94]

Q. Now, Mr. Henrie, can you tell us the annuity number of Frank Poewee? A. Yes sir.

Q. What is it? A. 1161.

Q. What do you mean by an annuity number?

A. That is the official number on the census record.

Q. Are all three of those Indians; Helen Toane, Ninip Toane and Frank Poewee wards of the United States Government? A. Yes sir.

Q. Do you have the hospital records for the Fort Hall hospital? A. Yes sir.

Q. Does that show that Frank Poewee was hospitalized at the Fort Hall Hospital?

A. Yes sir.

Q. What date did he enter the hospital?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

Q. Is that record a part of the official records of the Fort Hall agency? A. Yes sir.

Q. From that record are you able to tell when he entered the Agency hospital? [95]

A. Yes sir.

(Testimony of Leon M. Henrie.)

Q. When? A. November 11, 1941.

Q. Does it show when he left the hospital?

A. Yes sir.

Q. When did he leave?

A. On November 24, 1941.

Q. Do your records disclose the cost of keeping a patient in the hospital at the Agency?

A. \$3.50 per day per patient.

Q. Do you have in your record anything concerning the expenditure for the funeral of Ninip Toane?

A. Yes sir, I have some figures on that.

Q. And the funeral of Helen Toane.

A. Yes sir.

Q. Is that a part of the official records of the Fort Hall Indian Agency? A. Yes sir, it is.

Q. Does it disclose the amount of money expended by the agency for food which was used at the Ninip Toane and Helen Toane funeral?

Mr. Thompson: Objected to as hearsay and irrelevant. Not the best evidence and no proper foundation has been laid. [96]

The Court: I don't think the question calls for any information, it was simply whether he had such a record. He may answer whether he had or not.

A. I have some records covering the funeral expenses.

Q. And what do those records consist of?

A. What do they consist of.

Q. Yes,—not the items, but of what does the record consist?

(Testimony of Leon M. Henrie.)

A. The records consist of the individual accounts, the Indian's name and the accounts at the agency office, showing the expenditure of certain amounts.

Q. Those amounts were paid for by the Agency or not?

Mr. Thompson: That is a leading question.

The Court: Yes, it is somewhat leading but he may answer.

A. They were.

Q. With what?

A. Paid through the agency.

Q. How much does your record disclose was paid for food for the funeral of Ninip Toane and Helen Toane by the agency?

Mr. Thompson: Objected to for the same reasons and the further reason that food is not a proper burial cost or burial expense, nor is it one authorized by law. When I say for the same reasons I mean the reasons set forth to the question as to the funeral expenses by way of food, asked before. [97]

Mr. Casterlin: If I may withdraw this witness I will prove the Indian custom at funerals.

The Court: You may withdraw the witness.

Mr. Casterlin: I now offer Willie Edmo as an interpreter. My next witnesses will need an interpreter.

(Interpreter sworn)

ADELIA TOOTATH WEISER,

being called as a witness on the part of the plaintiff,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin.

Q. Please tell us your name?

A. Adelia Tootath Weiser.

Q. How old are you?

A. She doesn't know her age.

Q. Does she know about how old?

A. She is referring to this Nez Perce War that took place some time ago. She was a grown woman at that time.

Q. Do you know the custom at Indian funerals?

A. Yes, sir.

Q. Is it or is it not the custom to have food at Indian funerals?

A. She doesn't know anything of that kind.

[97-A]

Q. Do you know whether or not it is the Indian custom to have mourners? A. Yes, sir.

Q. At an Indian funeral?

A. Yes, sir, that is right that is their custom.

Q. How long does an Indian funeral service last?

A. Anywhere from four days.

Q. Do you know how long the funeral of Ninip Toane and Helen Toane lasted?

A. She only knows of the three days that the bodies was taken to the place. This lasted three days but she doesn't know how many days was held here.

(Testimony of Adelia Tootath Weiser.)

Q. During the three days was there any food consumed by the family or their friends?

A. Yes sir, there was some food and meat that was bought by the relations out there.

Q. Do you know what the meat was?

A. She doesn't know but the men folks were the ones buying the meat.

Q. Is it or is it not the custom at Indian funerals to furnish moccasins, vests, shirts, pants and things of that kind for the dead people?

Mr. Thompson: Objected to as immaterial. [98]

It is the custom to furnish shrouds for white people but it is not proper as a funeral expense.

The Court: I will permit the answer at this time, however, I will take the matter under advisement.

A. That is their custom.

Q. Do you know whether any of these things were furnished at the funeral of Helen Toane and Ninip Toane?

A. She remembers of her daughter's funeral, at the time of the funeral she had this tooth and shell dress, elk tooth and shell dress and some blankets, moccasins, belts. That is what she remembers at the funeral.

Mr. Thompson: Is it understood that I have objections to this line of questions?

The Court: Yes, it may be so understood.

Q. Do you know what the elk tooth and shell dress cost?

(Testimony of Adelia Tootath Weiser.)

A. She knows that it is not elk teeth, but shells but she doesn't know the value of the dress.

Q. Does she know the value of the moccasins?

A. She says she had the moccasins that she made up her own self before she died, but she didn't put any value on them.

Mr. Casterlin: That is all at this time.

The Court: At this time the Court will [99] strike the answers pertaining to any value of any gifts given by her or others for burial purposes here. I think the question here is only a question of custom and not of gifts given. They would not be entitled to recover for them.

Mr. Thompson: No questions.

LEON M. HENRIE

Recalled

Direct Examination—(Continued)

By Mr. Casterlin:

Q. Will you tell us from your records which are the records of the Fort Hall Indian Agency, the amount of money that was expended by the agency for food used and consumed at the funeral of Helen Toane and Ninip Toane?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial and hearsay and no proper foundation is laid and it is entirely without the proper measure of damages.

The Court: I don't think the proper foundation

(Testimony of Leon M. Henrie.)

has been laid as to the reasonableness of the expenditures unless you intend to connect it up. I think that it should be shown that the amount of the expenditure was within the custom of the Indians. I think, however, in order to save time I will allow this witness to answer.

Mr. Casterlin: I will show that. I will [100] have this witness step aside.

LIZZIE POKIBRO

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Lizzie, did you understand what the Clerk said when you were sworn?

A. Yes, I understood what he said.

Q. And do you swear to that? A. Yes sir.

Q. Were you acquainted with Ninip Toane and Helen Toane during their lifetime?

A. Yes, they were my neighbors.

Q. Do you know how long Ninip Toane's and Helen Toane's funeral lasted?

A. About four days, I didn't attend the last day, during the three days there were quite a number of people there, but I wasn't there on the fourth day.

Q. How many were there when you did attend the funeral?

(Testimony of Lizzie Pokibro.)

A. The three days I attended there was about two hundred.

Q. Whether or not it was conducted according to the Indian custom?

A. Yes sir, like Indians do. [101]

Q. Is it the custom to furnish food for the mourners and their friends?

A. Yes sir, it is the Indian custom.

Q. Do you know what food was furnished at Ninip and Helen Toane's funeral?

A. Yes sir.

Q. What was it?

A. Meat, some fruit, tomatoes, bread, vegetables, potatoes and corn.

Q. Do you know how much meat was used at the funeral?

A. I don't know but there was quite a lot. They killed one whole beef or a couple. I didn't ask but there was quite a lot of meat.

Q. At a funeral of that size would it be reasonable to use one, two, three or four beeves?

Mr. Thompson: Objected to as leading.

The Court: Sustained.

Q. How many beeves would be consumed at a funeral of this kind? A. About two.

Q. About how much would be expended for fruit, vegetables and other things that you and the others ate at the funeral, or at a funeral of this size, what would be reasonable?

Mr. Thompson: Object to that as incompetent, irrelevant and immaterial under any circumstances

(Testimony of Lizzie Pokibro.)

[102] because if there were expenditures made this is not the proper way to prove them. To establish what is the usual expenditure is not the measure of damages, or a proper measure of damages, but the measure is what is the proper expenditure here. I am not able to make any more definite objection at this time.

The court: Without any comment I will permit her to answer.

Q. Now, Lizzie, tell us what would be a reasonable amount for food for the number of people at the funeral, taking into consideration that the funeral lasted for four days.

A. May I ask, is it for stuff like groceries?

A. Yes, for groceries and things of that kind, and fruit and vegetables, not including the beef.

A. I would say about a hundred dollars.

Mr. Casterlin: That is all, you may inquire.

Mr. Thompson: No questions.

LEON M. HENRIE

Recalled.

Direct Examination—(Continued)

By Mr. Casterlin:

Q. Do the official records of the Fort Hall Reservation disclose how much was spent for fruit, groceries and supplies, excluding the meat, for the Ninip Toane and the Helen Toane funeral?

A. Yes sir. [103]

(Testimony of Leon M. Henrie.)

Mr. Thompson: I object to that,—first I assume that our general objection is overruled, and I object for the further reason that according to the Bill of particulars some of this was furnished by one, and some another and it is my belief that these items rest on different basis. I should be given an opportunity to object to the various expenditures by the various persons.

Mr. Casterlin: I will withdraw the question.

Q. Was this money which was expended for food exclusive of beef for the Toane funeral, paid out by the agency? A. Yes sir.

Q. Was it paid on the account of one or more individuals?

A. On the one individual account.

Q. Did this expenditure which was charged to one individual's account cover items furnished by others than that particular individual?

Mr. Thompson: Object to that as the record would be the best evidence. No proper foundation is laid.

Q. Tell us how this bill was paid? Let's see if we can get it straightened out so that a railroad attorney will understand it.

Q. These bills was paid from the account of Ninip Toane upon presentation by the leading heir.

A. Who was that? [104]

A. Irving Toane.

Q. They were paid upon his presentation?

A. Upon him bringing in receipts for the materials.

(Testimony of Leon M. Henrie.)

Q. Do you have receipts for these goods?

A. Yes sir.

Mr. Casterlin: We ask to have these marked as exhibit 1 for identification.

Q. Was the money in payment of all the items included in this exhibit marked one for identification paid out of the funds of the estate of Ninip Toane?

Mr. Thompson: We will admit that they were.

Mr. Casterlin: We now offer exhibit 1 and 1a.

Mr. Thompson: That is a total of \$63.00.

Mr. Casterlin: \$63.28.

Mr. Thompson: The only objection I have is the objection that I have been having as a standing objection.

The Court: The exhibits may be admitted.

Q. Mr. Henrie will you tell me what the total of these receipts is? A. \$63.28.

Q. You said something about the chief heir of Ninip Toane, who is that? [105]

A. Irving Toane.

Q. Do you know whether or not there were any other children born to Ninip Toane and Helen Toane?

A. Our records show that there were five children born but died in infancy and that Irving Toane is the only one living.

A. He was born in what year?

A. He was born in 1915.

Q. Is he married or single? A. Married.

Q. Is his wife still living? A. Yes sir.

(Testimony of Leon M. Henrie.)

Q. Do they have children?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

A. Is Irving Toane still living?

A. I believe so.

Mr. Casterlin: You may take the witness.

Cross Examination

Mr. Mr. Thompson:

Q. You said that the bill of \$63.28 was paid out of the account of Ninip Toane. I infer from that, that even before his death you carried an account with him on the books of Fort Hall?

A. Yes sir. [106]

Q. What was the purpose of that account?

A. That was his bank account.

Q. So that he had more money than \$63.28 when you paid that out of his account.

A. I wouldn't say that.

Q. Don't you know what his bank account was?

A. Not at that time. That might have been future money coming in on his year's income.

Q. Do you know what his income was for that year?

A. I think I have it written down here somewhere, it will take a minute to find it, but I think I have it.

Q. We will pass that since you have to look it up. What did he derive his income from?

A. I think he had some cattle interest, and some leased land.

(Testimony of Leon M. Henrie.)

Q. Do you know the extent of his ownership of cattle? A. I cannot answer that exactly.

Q. He had more than two beef cattle?

A. I wouldn't know, but I can answer your income question, according to my record.

Q. But you didn't make a record and you have no knowledge of what they are made up of?

A. No, I didn't.

Q. Concerning his land, what kind of land was that,—how much was irrigated? [107]

A. I think 20 acres was irrigable and 160 acres grazing or dry farming.

Q. That was likewise true as to the land holdings of his wife? A. Yes sir.

Q. Mr. Casterline spoke of it as their land, now, subject to certain limitation they were the owners of the land, subject to guardianship.

A. Yes sir.

Q. What did you do with that land on the books in such cases as this, where the parents die, with respect to the land passing on the books of your office in Fort Hall?

A. The title goes to the determined heirs.

Q. In this case it would be Irving Toane.

A. In the case of Irving Toane he inherited all of Ninip Toane, and,—yes, I can tell you,—Helen Toane, anything she owned went to Ninip Toane and Adelia Weiser and all of Ninip Toane's went to Irving Toane as the sole heir.

Q. Irving Toane had an allotment of his own didn't he? A. I think not, no sir.

(Testimony of Leon M. Henrie.)

Q. He had land upon which he lived and occupied didn't he? A. Yes sir.

Q. How much was that, and what was it?

A. I cannot answer that, I don't know.

Q. You know he claimed agricultural deferment in the draft? [108]

Mr. Casterlin: You know he is in the army now Mr. Thompson.

Mr. Thompson: Yes, and I know why, shall I develop it?

Mr. Casterlin: I object to the question as immaterial.

The Court: Sustained.

Q. Now, getting to Frank Poewee, you testified concerning him did you not? A. Yes sir.

Q. Do you know where he lives with reference to Fort Hall? A. No sir.

Q. With reference to the agency? A. No.

Q. Do you know that he has a parcel of land upon which he lives and has lived for a number of years? A. No sir, I don't know that.

Q. Were you asked to bring his account or to be prepared to show what he owned?

A. I think not.

Q. You spoke about an annuity number 1161 allotted to Poewee I believe, what does an annuity number mean?

A. It is the official number under which they are carried on all census rolls and records, especially where they are not allottees. [109]

(Testimony of Leon M. Henrie.)

Q. What does it apply to if it is not their allotment? A. It is primarily the census.

Q. That is, he is Indian number 1161.

A. Yes sir, on the Fort Hall reservation.

Q. That is all they signify as far as you know?

A. Yes sir.

Q. How long have you been there at Fort Hall?

A. About two years.

Q. Then you had nothing to do with any of these entries that you have been testifying to, or the making of any of these records?

A. Not personally, no sir.

Q. That is what I asked, personally.

A. No sir.

Mr. Thompson: That is all.

Mr. Casterlin: That is all.

HELEN YOUNG

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Helen Young is your name? A. Yes sir.

Q. You live in Pocatello? [110]

A. Yes sir.

Q. You are a registered nurse?

A. No sir, I am the bookkeeper at the General Hospital.

(Testimony of Helen Young.)

Q. As such bookkeeper do you have access to the official records of the hospital? A. Yes sir.

Q. That is the Pocatello General Hospital?

A. Yes sir.

Q. Did you find in such records, any record concerning Frank Poewee, during the month of October 1941? A. Yes sir, and November.

Q. Does that record disclose that he was or was not hospitalized during that month?

A. He was hospitalized for six days.

Q. When did he enter?

A. On the 29th of October.

Q. That was what year? A. 1941.

Q. He left when?

A. The 4th of November.

Q. 1941? A. Yes sir.

Q. Does that record disclose the expense of his hospitalization? A. Yes sir.

Q. What was that? A. \$34.30. [111]

Q. Has that been paid.

A. Yes sir, paid by the Agency.

Q. Is that his clinical record (indicating).

A. I have the financial record and the hospital record, the clinical record.

Q. Does that clinical record show why he was hospitalized?

A. Shows why he was hospitalized.

Q. Will you tell us what the clinical record shows?

Mr. Thompson: I suggest that the record is the

(Testimony of Helen Young.)

best evidence, and her statement would be hearsay.

The Court: That is correct.

Mr. Casterlin: We now offer in evidence plaintiff's exhibit 2 with the understanding that a copy of it may be made and substituted for the original.

Mr. Thompson: No objection.

The Court: Admitted.

Mr. Casterlin: I will read this exhibit into the record at this time.

Name: Mr. Frank Poewe; Fort Hall, Idaho.
Age 27.

Doctor: Olsen.

Working Diagnosis:

1. Cerebral contusion.
2. Shock.
3. Contusion of eye and scalp. [112]
4. Laceration of right arm.
5. Contusion of abdomen.
6. Fracture 12th rib.
7. Contusion of back.

Complications: X-ray fracture of twelfth rib right, much intra abdominal gas, suggestive of shock or abdominal injury.

Admitted 10-29-41. Discharged 11-4-41.

Medical. Treatment: Important points. 1. Bloodcount. 1. Uninanalysis Condition of discharge: Improved.

Mr. Casterlin: That's all; you may take the witness.

(Testimony of Helen Young.)

Cross Examination

By Mr. Thompson:

Q. Have you records which indicate who the attending physician was?

A. Yes, sir; Dr. Olsen.

Q. What are his initials?

A. I don't recall.

Mr. Casterlin: I will agree that it was Dr. W. L. Olsen who was the Agency and the Railroad Company Doctor.

Mr. Thompson: That is all.

Mr. Casterlin: That is all, thank you. [113]

ADELIA TOOTATH WEISER

Recalled.

Mr. Casterlin: May it be agreed that she was and is the same witness who was sworn before and testified in this trial.

Mr. Thompson: Yes.

Q. Are you related to Helen Toane?

A. Yes, she is the Mother of Helen Toane?

Q. How long did Helen Toane live with you before she was married?

A. She doesn't remember what year that she lived with her, it wasn't very long and after that she married Ninip Toane.

Q. After Helen Toane married Ninip Toane did she visit with her Mother?

A. Yes, she has visited me often.

Q. How far do you live from Helen Toane's home?

(Testimony of Adelia Tootath Weiser.)

A. It is quite a ways from her place. She says she doesn't know what a mile is. She cannot tell what a mile is.

Q. Did Helen Toane visit you at any time up to the time of her death?

A. Yes, she visited me about three or four times before this accident happened. She was telling me she was going after wood.

Q. Did Helen ever contribute or give you anything to live on, or any money, or food?

A. She has contributed some money and food.

Q. How often would she give her money and how often would [114] she give her food?

A. Well, it is,—there is a certain period she didn't give much in them days, not often.

Q. Did Ninip Toane give you anything like money or food or support?

A. No sir, he never.

Q. Do you know Clinton Bear?

A. Yes sir, that is my son.

Q. Do you know Lillie Nagitsy?

A. Yes, she knows her.

Q. Are you any relation to Lillie Nagitsy?

A. Yes, my daughter.

Q. Do you know Mrs. John Nena Tendoy?

A. That is my oldest daughter.

Q. Did Helen Toane, Clinton Bear, Mrs. John Tendoy all have the same Father?

A. She says these three, I suppose she means Lillie Nagitsy, Mrs. John Tendoy and Clinton have

(Testimony of Adelia Tootath Weiser.)

the same father but Helen Toane she has another father.

Q. Do you remember when Helen Toane died?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

(No ruling.)

A. She doesn't know, she thinks it is about three years.

Q. Did you attend the funeral?

A. Yes sir. [115]

Q. Have you missed Helen Toane since her death?

Mr. Thompson: Objected to as incompetent, irrelevant, and immaterial. The only measure of damage is the pecuniary damage.

The Court: Objection sustained. If counsel cares to present authorities later I will hear you.

Q. Do you know how much money Helen Toane would give you each year?

Mr. Thompson: Objected to as leading.

The Court: I think it is leading.

Q. Do you know how much money Helen Toane gave all together during her lifetime?

A. She don't know exactly, maybe better than a hundred dollars. She really doesn't know.

Q. Do you know how much food Helen Toane gave you when she was alive?

A. Sometime she buys her about twenty dollars worth of groceries and sometimes she buys her a shawl.

(Testimony of Adelia Tootath Weiser.)

Q. How often would she buy you food?

A. Sometime it would be two weeks about, other times it would be a longer period than that.

Q. Sometime it would be two weeks?

A. Yes.

Q. Could you tell us about how many times a month or a moon [116] Helen Toane gave you food?

A. She said about every two months sometimes.

Q. Did this continue or last since she married Ninip Toane, or was it just part of the time,—did this last all of the time after she married Ninip Toane or part of the time after Helen Toane married Ninip Toane?

A. She said when she was small I used to provide her groceries and after she grewed up she helped provide groceries for me.

Q. Are you married now?

A. Yes, to Sam Weiser.

Mr. Casterlin: I think that's all, you may take the witness.

Cross Examination

By Mr. Thompson:

Q. Does the witness have any land or cattle?

A. She has no cattle but she has land.

Q. Is some of that land irrigated or watered?

A. Part of it has got water.

Q. Does her husband have some land and cattle?

A. Her husband has land but no cattle.

Q. How much of that land is irrigated or watered?

(Testimony of Adelia Tootath Weiser.)

A. She says part of her allotment is watered but she doesn't know the acreage, but a certain irrigable tract is not watered. [117]

Q. I asked about her husband?

A. His land is about the same way as hers.

Q. How does she get her groceries to eat and live on now?

A. She says she sews up some buck-skin, and she gets,—I believe she is referring to this old age pension every month.

Q. Who does she get this old age pension from?

A. She doesn't really know where this pension money comes from.

Q. She gets everything she needs?

A. She gets along fairly well on the pension.

Q. Before Helen Toane died how did she get things to eat when Helen Toane didn't give it to her?

A. She says she has been doing a lot of Buck-skin work and that is how she provides her own living.

Q. She got a pension from the Government before Helen Toane died? A. Yes sir.

Q. What does her husband do for a living, how does he get money and food and so on?

A. He does a little farming.

Q. Does he get a pension too?

A. He used to get some kind of a pension but somehow it has been cut off.

Q. Does she know who cut it off?

A. She doesn't know that. [118]

(Testimony of Adelia Tootath Weiser.)

Q. Does she get her pension from the Agency?

A. That is where she gets it.

Q. Mr. Thompson: That is all.

Mr. Casterlin: Yes, that is all.

DR. W. L. OLSEN

Being called as a witness on behalf of the plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Your name is Doctor W. L. Olsen?

A. Yes sir.

Q. You reside here? A. Yes sir.

Q. Resided here in October 1941?

A. Yes sir.

Q. At that time did you have any connection with the Fort Hall Indian Reservation?

A. I was consulted by Doctor Dewey who was then Agency physician when he wanted assistance in taking care of a patient.

Q. Did you have a retainer from the Agency?

A. No, sir, on a fee basis.

Q. Were you physician and surgeon for any other institution in this County? [119]

A. The Union Pacific Railroad Company and the Oregon Short Line.

Q. Were you called in October 1941 to attend one Frank Poewee? A. Yes sir.

Q. When was that? A. October 29, 1941.

(Testimony of Dr. W. L. Olsen.)

Q. What were the circumstances?

A. Doctor Dewey called me at my home, saying that he was bringing an Indian in to the General Hospital who had been injured in a train accident and would I come in and see the Indian with him, so I did.

Q. What Indian did you find there?

A. Frank Poewee.

Q. At that time did you make a physical examination of Frank Poewee? A. Yes, I did.

Q. Prior to that time you knew that he had been brought in as a result of an accident?

A. That is what Doctor Dewey told me.

Q. Could you talk to Frank Poewee at that time? A. Not at that time.

Q. Did Doctor Dewey tell you how and where this accident had taken place? A. Yes sir.

Q. What did he tell you?

A. That the train and an automobile had collided at Fort Hall on a crossing. [120]

Q. Did you make an examination of Frank Poewee to ascertain the injuries which were attributable to this accident, directly or indirectly?

A. Yes sir.

Q. What did you find as a result of your examination?

Mr. Thompson: Just a minute,—no, I will withdraw any objection that I might have.

Q. What did your examination disclose as to his condition? What did you find his condition

(Testimony of Dr. W. L. Olsen.)

to be as a result of this accident, what was attributable, directly or indirectly, to this accident?

Mr. Thompson: We object to this as calling for a conclusion of the witness.

The Court: Yes, I think you can ask what his condition was.

A. You mean the injuries?

Q. Yes. A. May I refer to some notes?

Q. Yes.

A. I took these from the hospital records. He was unconscious or semi-conscious and in shock. His pulse was very weak, blood pressure low; contusion about the right ear; concussion and he had cuts and lacerations of the right arm and about the nose; bruises about the lower part of the abdomen; bruises in the lower portion of his back; he had a fracture or break of the last rib on the right side. [121]

Q. What was the abdominal condition. You mentioned a condition of the abdomen. What was that?

A. He had bruises; he was tender, some of these things I discovered later. The man was unconscious when I first saw him.

Q. How many times did you visit him?

A. Twice daily during the time he was in the hospital.

Q. These findings were developed over that period?

A. Yes, sir.

Q. What was the abdominal condition?

A. He was tender to pressure. He was some-

(Testimony of Dr. W. L. Olsen.)

what black and blue in subsequent days after he had been there two or three days.

Q. During this time was there any abdominal gas? A. I don't know what you mean.

Q. Did this injury to the abdomen cause any gaseous condition?

A. He complained of pain during the time but he had no especial disturbance of the abdominal functions.

Q. Was the abdominal wall punctured at any place? A. No sir.

Q. Explain the condition of the right arm.

A. He had several superficial cuts, not very bad, in the skin of the right arm.

Q. Where were those on the arm?

A. Between the elbow and the shoulder. On the upper arm.

Q. What about the nose? [122]

A. Superficial cuts through the skin.

Q. No fracture of the bones? A. No sir.

Q. What about the condition of the right eye?

A. Soft tissue injury. You and I would commonly call it a black eye.

Q. Was his vision effected? A. No sir.

Q. Just what we would call a black eye?

A. Yes sir.

Q. What about the scalp?

A. He had bruises about the scalp on the right side. Black and blue areas with some swelling.

Q. Cuts?

A. Superficial abrasions but no cuts.

(Testimony of Dr. W. L. Olsen.)

Q. You mentioned that he was semi-conscious after this? A. Yes sir.

Q. After examining his head and the bruises about the head are you able to say as a physician and surgeon, what caused that semi-consciousness?

A. I think so.

Q. What was it?

A. The result of a injury he sustained about his head. What we call a concussion of the brain. Injury resulting in loss of consciousness. A semi-conscious state without any subsequent brain damage. [123]

Q. No subsequent damage to the brain in this case? A. Not so far as I could see.

Q. What about the shock?

A. When the man came in he was very pale, his pulse was quite rapid and quite weak; his blood pressure low and he was semi-conscious. If you would attempt to move him about he would object to being moved in bed. He would not respond to questioning, but he did respond to painful manipulation.

Q. Did that condition progress or retrogress?

A. It retrogressed. The next morning he wanted to eat.

Q. What about the back injury?

A. He had bruises across the lower portion of the back, what we call the tail-bone, when he was moved he would say it would hurt his back. This complaint subsided to the point that when he left

(Testimony of Dr. W. L. Olsen.)

about seven days later he was able to leave in a wheel chair and ride in an automobile to Fort Hall.

Q. When you were first called what have you to say respecting his ability to move?

A. He was unconscious. He didn't move unless he was hurt. When I attempted to examine his abdomen and pushed firmly where these injuries were he would squirm and move.

Q. After he became conscious what have you to say respecting his free movement? [124]

A. He was able to feed himself and he was able to move about in bed from side to side. With the assistance from the nurse he was able to be put on the bed-pan.

Q. What about his lower extremities?

A. He was able to move them about without a great deal of pain.

Q. Could he move his legs voluntarily?

A. Yes sir, when you hurt him during the initial examination he moved his legs about.

Q. How about the fracture of the 12th rib, was it the 12th rib?

A. We diagnosed that and our diagnosis was based upon physical evidence. When the chest was examined we noted upon pressure on the last ribs you could feel the broken ends of the bone and also a little air under the skin due to the puncture of the lower vesicle of one of the lungs.

Q. What treatment did you give?

A. Put him to bed gave him sufficient opiates to control the pain. I don't know whether we gave

(Testimony of Dr. W. L. Olsen.)

him any fluid. Kept him warm. His wounds were dressed and injuries to the head dressed with bandages. That was the extent of his treatment.

Q. How did he respond to the treatment?

A. Quite well. [125]

Q. When he left what was your prognosis?

A. Ultimate recovery.

Q. After he left the general Hospital after that seven days how did he leave?

A. In a wheel chair taken to his room. He sat in the wheel chair and was taken to the entrance and transferred to an automobile.

Q. Going from the bed to the wheel chair, how did he make that? A. I wasn't there.

Q. After he was taken to the Fort Hall hospital did you visit him? A. No sir.

Q. Have you had occasion to examine him since that time? A. He came to my office last week.

Q. Did you make an examination?

A. Yes sir.

Q. What did you find as a result of your examination?

A. I asked him what bothered him and he said his back. I asked when it bothered him and he said when he got up first in the morning it was stiff. When he stooped over to lift anything heavy, sack of wheat or something like that he said it hurt him—hurt his back and he also said he had some pain on the lower right side where his rib was fractured. [126]

(Testimony of Dr. W. L. Olsen.)

Q. Based upon the history of the case and your first examination, and your knowledge as a physician and surgeon, are you able to say within the realm of reasonable certainty that the condition of which he complained when you made this last examination are the result of this original injury?

A. I think that would be a reasonable conclusion.

Q. What did you find to be his percentage of recovery on this last examination, from these injuries which you have described?

A. Well, of course, he says that he has pain when he attempts to do what I would consider heavy manual labor. I would say that if he depends on heavy physical labor for a livelihood that he would suffer a moderate amount of incapacity, whereas, if he depended on a lighter and more sedentary occupation his incapacity would not be so great.

Q. Do you think he would be qualified for office work? A. Physically, yes.

Q. Mentally or otherwise is he qualified?

A. No sir.

Q. If he sustains himself it would be by manual labor?

Mr. Thompson: I object to that question, it is speculative.

The Court: Sustained. [127]

Mr. Casterlin: Exception please.

Q. Basing your answer upon the subjective and objective history of this case and the examination

(Testimony of Dr. W. L. Olsen.)

of Frank Poewee and your knowledge and experience as a physician and surgeon, what have you to say as to whether or not this hip injury and the pain in the back of which he complains is it or is it not permanent?

Mr. Thompson: May I examine in order to make an objection?

The Court: Yes, you may.

By Mr. Thompson:

Q. So far as this man having pain in his back is concerned you had no means of independently determining this apart from his statement, whether he had it or not? A. That is right.

Q. That was true of his hip? A. Yes sir.

Q. And any prognosis you made would be based upon what he said rather than anything you found?

A. That is true.

Q. That is true with reference to the answers you made, particularly concerning his condition or recovery? A. Yes sir.

Q. So far as you can determine from any independent examination you cannot find anything the matter from anything other [128] than his own statement?

Mr. Casterlin: Objected to as not proper examination at this time.

The Court: That is true. The objection is sustained at this time.

Mr. Thompson: Now, I object to the question asked by Mr. Casterlin, as it calls for a summation by this man of all the evidence including the state-

(Testimony of Dr. W. L. Olsen.)

ments of this man, and asks him to determine a question that is a question for the jury, we object that this invades the province of the jury.

Mr. Casterlin: I will concede that he has an objection that is good and I withdraw the question.

The Court: That saves me the trouble.

Q. What is your prognosis as to the back and hip injury?

A. Mr. Thompson: Are you basing that on knowledge of the witness or examinations made?

Q. Basing your answer upon the examination of Mr. Poewee, your testimony in this case, subjective and objective symptoms, together with your knowledge and experience as a physician and surgeon. What is that prognosis respecting the back and hip injury?

Mr. Thompson: Objected to upon the ground that he asks this witness to accept the statement of this patient and upon examinations made. [129]

The Court: I think if the objection was good to the last question it is good to this.

Q. As a result of your examination a week ago are you able to make a prognosis?

A. That includes some of the questions I asked him about what he had been doing.

The Court: Just answer that question yes or no.

A. Yes sir.

Q. What is that prognosis?

Mr. Thompson: Now, he says that it would be based upon what this man told him.

(Testimony of Dr. W. L. Olsen.)

The Court: Are you basing it upon what this man told you?

A. Yes sir.

The Court: Objection sustained.

Q. Can you give us a prognosis independent of the subjective symptoms?

A. No, I don't think I can.

Mr. Casterlin: I think that is all.

The Court: We will have a recess for 15 minutes.

3:35 P.M. Oct. 18, 1943.

Mr. Casterlin: May I ask another question?

The Court: Go ahead.

Q. Were you paid for your services in this connection? [130]

A. Yes sir.

Q. How much? A. Five dollars.

Q. Do you know where Doctor Carol W. Dewey is?

A. No sir, I don't.

Mr. Casterlin: That is all.

Cross Examination

By Mr. Thompson:

Q. You said that when Poewee came to you within the last week that you had some conversation with him and that your answers concerning the condition at that time were based largely upon your conversations. Did you make inquiry as to what he has been doing since the time you had him in the hospital?

A. Yes sir.

Q. What did he tell you concerning his work?

A. He said he was farming.

(Testimony of Dr. W. L. Olsen.)

Q. Did he say how the farming he is doing now compared with the farming he did heretofore in previous seasons?

A. I didn't ask him the type of farming he was doing. I asked what he was doing and he said farming. I asked how he was getting along and he said pretty good.

Q. Did he say whether he had any help or not?

A. I asked if he could do his own farm work and he said yes.

Q. That rib that was fractured, what rib was that? [131]

A. The last rib on the right side.

Q. That is sometimes called the floating rib?

A. Yes sir.

Q. How near to the end was it fractured?

A. I didn't take an X-ray.

Q. But as you palpated it——

A. Yes, it was close to the attachment to the spine.

Q. What did you do, did you tape it up?

A. No sir, I kept him in bed.

Q. He showed marked improvement?

A. Yes, he did very well.

Q. You didn't think it was necessary to tape him? A. No, I didn't think so.

Mr. Thompson: That is all.

Mr. Casterlin: That's all.

FRANK POEWEE

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Your name is Frank Poewee?

A. Yes sir.

Q. Where do you reside?

A. Fort Hall, Idaho.

Q. You are an Indian? [132] A. Yes sir.

Q. Belong to what tribe? A. Bannock.

Q. Is your Father living? A. No, dead.

Q. Is your Mother living?

A. She is also dead.

Q. How long have they been dead?

Mr. Thompson: What is the materiality of this. I object as incompetent, irrelevant and immaterial.

The Court: Of course, I cannot see the purpose of this at this time, perhaps counsel has some reason for it. I think he may answer.

Q. How long have your parents been dead?

A. About twenty-eight years ago.

Q. With whom have you been living?

A. Lamar Pokibro.

Q. They are your foster parents?

A. Yes.

Q. Do you recall the month of October 1941 when an accident occurred on the Fort Hall reservation? A. Yes sir.

Q. Where had you been?

A. Up to the mountains to get wood.

Q. Who went with you? [133]

(Testimony of Frank Poewee.)

A. Ninip Toane and his wife.

Q. What time did you come back?

A. Close to six o'clock.

Q. Why did you go to the timber, why did you go up in the hills?

A. They wanted to have that wood hauled.

Q. Did you bring back a load of wood?

A. Yes.

Q. Tell us what happened as you came back?

A. On the way over we didn't talk very much. As we got to the crossing, I slowed down and shifted to the first gear. I continued on going over the track, just on this one track and then pretty soon this lady she hollered here comes a train.

Q. Did the train hit you? A. Yes sir.

Mr. Thompson: Just a minute,—I think that is what you would like to get in.

Mr. Casterlin: He answered.

Q. Did the train hit you? A. Yes.

Q. What did you do,—what do you next remember after the train hit you?

A. All I can remember is when I was sitting in the cinders facing toward the freight slowly going by.

Q. Where was the truck?

A. The truck was on the south side of the fence.

[134]

Q. Do you know where Ninip Toane was?

A. His wife was close to the freight and near by her husband was laying there.

(Testimony of Frank Poewee.)

Q. Were you conscious so you can remember what you saw? A. Yes.

Q. Can you tell us whether Ninip Toane was alive when you saw him?

A. He was trying to get up and groaning at the same time.

Q. Was Helen Toane alive then?

A. No, she was laying still.

Q. What did you do then?

A. Tom Tyboats came over and asked if I was all right and I told him yes, I didn't know I was injured so bad.

Q. Who is Tom Tyboats?

A. He is an Indian on the reservation.

Q. After that what happened?

A. They loaded us in a little pick-up and took us to the Fort Hall agency hospital.

Q. Who do you mean when you say they loaded us up, who did they load into the pick-up?

A. Ninip and his wife and myself.

Q. Was Ninip alive at that time?

A. He was groaning, and that is about all I know.

Q. Was Helen alive at that time?

A. No. [135]

Q. Where did they take you then?

A. From the agency the employees took me to the General Hospital in town here.

Q. After the train hit you how did you feel?

A. When I got over to the agency hospital I

(Testimony of Frank Poewee.)

went toward the steps and I couldn't climb the steps because of my leg.

Q. What was the matter with your leg?

A. Something wrong with my hip.

Q. Did you have any pain at that time?

A. Yes.

Q. Where?

A. Back and of course the broken hip and my leg.

Q. How about the head?

A. Kind of a little bump on the right eye.

Q. After you were there at the agency hospital what was done?

A. They stuck a needle in me before going to the General Hospital.

Q. After they stuck the needle in you what do you remember?

A. I guess I went to sleep after that.

Q. What do you next remember?

A. All I remember was in the hospital in bed.

Q. What were your feelings then, just tell the jury how you felt in the hospital?

A. Well, my back was sore at that time and my leg and I couldn't hardly lift it. When they washed my body my [136] right leg hurt.

Q. Anything else that you remember?

A. Of course I got a little scratch on my right arm.

Q. Anything else? A. Black eye.

Q. Which eye? A. Right eye.

Q. Anything else? A. Bruises on the back.

(Testimony of Frank Poewee.)

Q. Where on the back?

A. Below the right ribs.

Q. Anything else you noticed about yourself?

A. I know I have a broken rib.

Q. Was there anything else you noticed about yourself, do you recall anything else?

A. As near as I remember my hurts, that is about all I remember.

Q. Do you remember how long you stayed in the hospital in Pocatello? A. About a week.

Q. Where did you go then?

A. They transferred me to the Agency Hospital.

Q. How did you get from the Pocatello Hospital to the Agency hospital?

A. Doctor brought me over. [137]

Q. How did the Doctor take you over?

A. In a car.

Q. How did you get from the hospital to the car?

A. On a wheel chair.

Q. How did you get from the bed to the wheel chair?

A. I had a little assistance from the Doctor and the nurse.

Q. On the way from the Pocatello hospital to the Fort Hall hospital, what were your feelings then?

A. I was kind of shaky.

Q. Could you walk by yourself then?

A. No.

Q. Did you have any pain and suffering at that time? A. My leg was sore.

(Testimony of Frank Poewee.)

Q. Do you remember whether or not they stuck a needle into you more than once?

A. Just once, that was at the agency hospital.

Q. When you arrived at the agency hospital how did you get from the car to the hospital?

A. I got a little assistance from the Doctor and the nurse.

Q. What was done with you then?

A. I was put in a bath tub to be washed and put to bed.

Q. Were you able to give yourself a bath or did someone give you a bath?

A. I washed myself.

Q. How did you get from the bath tub to bed?

[138]

A. I got a little assistance from the attendant.

Q. How long did you stay in the hospital at Fort Hall?

A. I got out the 20th I think.

Q. The 20th of what month?

A. November.

Q. Where did you go then?

A. I asked some people to haul me over to the house.

Q. *Who* house is that?

A. Lamar's house.

Q. Your foster parent?

A. Yes sir.

Q. During the time you were in the Fort Hall hospital did your condition change any?

A. Just a little.

Q. For the better or worse?

A. Better, but I couldn't hardly walk very good.

Q. When you left the Fort Hall Hospital what was your condition? How did you feel?

(Testimony of Frank Poewee.)

A. Well, my leg was kind of sore from my hips and over my back.

Q. How did your head feel?

A. My head feels all right.

Q. When you went over to Lamar's place what did you do then? A. I went to bed.

Q. How long did you stay in bed at that time?

[139]

A. About a week.

Q. Then what did you do?

A. Got up and took exercise.

Q. Did you do any work around the place?

A. No I couldn't do any work.

Q. Lamar lives on a ranch? A. Yes sir.

Q. How far from Fort Hall?

A. About three miles and a half.

Q. How big a place is that?

A. Just a small place.

Q. How many acres in cultivation?

A. Forty.

Q. After you got back and got out of bed what did you do then?

A. I just stayed around there and didn't do any work.

Q. For how long a time didn't you do any work?

A. Until spring about April I guess.

Q. Why didn't you do any work until April?

A. On account of my back and leg.

Q. That would be in April 1942?

A. Yes sir.

(Testimony of Frank Poewee.)

Q. When the spring work opened up in April 1942 what did you do?

A. I started to work, did light work.

Q. What work did you do during the season of 1942?

A. Discing and leveling. [140]

Q. Did you do that yourself?

A. Yes.

Q. What effect did that have on you?

A. It always give me a tired feeling.

Q. After the work was done in 1942 then what did you do in the winter of 1942? That would be last winter.

A. You mean that winter?

Q. Yes.

A. Well, in the fall I hauled wood. I didn't do much work then.

Q. When you started to haul wood in the winter of 1942 how did you feel then, when you worked?

A. I was still shaky at that time.

Q. Now, at the present time are you able to work?

A. No,—just light work.

Q. What do you mean by light work?

A. Not lifting any heavy stuff.

Q. Like what?

A. Well, just like harrowing, and discing and that kind of work.

Q. When you lift heavy objects does that have any effect on you Frank?

A. Yes.

Q. What?

A. It gives my back a pain. [141]

Q. Just describe what pain you have when you lift heavy objects of any kind?

(Testimony of Frank Poewee.)

A. Sort of feels like it is going to jerk me down when I lift any heavy object.

Q. Stand up and show the jury where that pain is.

A. Back in the small place in the back.

Q. On the right or left side?

A. The right side.

Q. The right side you say? A. Yes sir.

Q. Is that pain right there in that one place?

A. Yes sir, and of course, in the hip here (indicating).

Q. Do you feel any other effects when you do any heavy lifting?

A. No sir, just that back and leg.

Q. Do you have any property? A. Yes.

Q. What? A. Forty acres of land.

Q. Forty acres? A. Yes.

Q. How much of that forty acres is tillable?

A. All of that forty.

Q. During the years 1942 and 1943 did you raise crops on there yourself?

A. No sir, I have got it leased. [142]

Q. To whom do you have it leased?

A. Some Japanese.

Q. Prior to the time you had it leased did you work this place yourself? A. Yes sir.

Q. Since the lease have you done any work on it? A. No.

Q. Do they pay you rent? A. Yes.

Q. What rent do they pay you?

A. \$9.00 an acre.

(Testimony of Frank Poewee.)

Q. Do you have any other income?

A. No.

Q. Do you own any cattle? A. No.

Q. Do you have any sheep? A. No sir.

Q. Do you have any other property outside of this forty acres, that brings you in any money?

A. No.

Q. You said that you live with your foster parents? A. Yes sir.

Q. And have for a long time?

A. Yes. [143]

Q. How large a place do they have?

A. Lamar he has twenty acres of land and Lizzie she has about thirty acres.

Q. Twenty acres that belongs to Lamar, how much of that land do they raise a crop on?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. About sixteen or seventeen acres.

Q. And on Lizzie's land, how many acres do they use of that land, if you know?

A. She has got it leased.

Q. How much of it will raise crops?

A. All of it, the thirty acres all of it.

Q. During the time you have lived with your foster parents have you known any other parents?

A. No sir.

Q. During the time you have lived with them have you contributed anything toward their support?

(Testimony of Frank Poewee.)

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: If this was to show his contribution to them, then the objection will be sustained, but if it is for the purpose of showing his physical condition, that *is* was such that he could contribute to them, I think I will permit it. [144]

Mr. Casterlin: It is for the purpose of showing less contribution since the accident.

The Court: Sustained.

Mr. Thompson: If there was any answer, may it be stricken?

The Court: Yes, it may be stricken.

Mr. Casterlin: I would like to make an offer of proof.

The Court: I will excuse the jury and they may wait in the corridor until the Bailiff calls for them.

(Admonition to the jury.)

In the Absence of the Jury:

Mr. Casterlin: The conditions of this bond and statute is that the bond is in the penal sum of \$10,000 for the use and benefit of the Shoshone-Bannock tribes of Indians conditioned for the payment of damages by reason of killing or maiming of any Indian belonging to said tribes. Lamar Pokibro was a member of the tribe and if he was damaged by the accident by reason of lessened support, I offer to show that. This statute runs to the benefit and use of the Shoshone-Bannock tribes of Indians.

The Court: The offer will be denied.

(Testimony of Frank Poewee.)

Mr. Casterlin: I offer to prove by this witness that prior to his injury he contributed by [145] labor and money to the support of his Foster parents. It being in the evidence that his natural parents have been long since deceased. And that since the injury, the amount that he has been able to contribute to their support and to his own support has been lessened.

The Court: The ruling of the Court will stand, offer refused. You may call the jury.

In the Presence of the Jury:

Q. Now, Frank, I think you said that you have leased your ranch to some Japanese?

A. Yes sir.

Q. Did you tell us the rental they pay?

Mr. Thompson: Yes, he said they paid \$9.00 an acre.

Q. That is \$9.00 for each one of the forty acres?

A. Yes.

Q. \$360.00 a year? A. Yes.

Q. Is that more or less than you made off the place when you operated it yourself?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. How old are you? [146] A. Thirty.

Q. You are thirty now? A. Yes.

Q. Do you know what became of the truck you were driving?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

(Testimony of Frank Poewee.)

The Court: He may answer.

A. Yes, I do.

Q. What became of it?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial and not within the terms of the statute or bond.

The Court: He may answer.

A. Jesse M. Chase bought it.

Q. Who was the owner of that truck?

A. Lamar Pokibro.

Q. Did you use that in connection with your own ranch? A. Yes.

Q. How?

A. Hauling grain, hay and wood and hauling for other people.

Q. You hauled for other people for money?

A. Yes sir.

Q. Other people would pay you for work with the truck? A. Yes sir.

Q. To whom would you give that money? [147]

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial, and without any issue of this case.

The Court: Yes, it seems that is well taken, objection sustained.

Q. How do you feel now?

A. My back aches, my chest and my leg pains every once in a while.

Q. Do you have any brothers or sisters?

A. No sir.

(Testimony of Frank Poewee.)

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: He says that he has not.

Mr. Casterlin: That is all. You may examine.

Cross Examination

By Mr. Thompson:

Q. How far do you live from the Fort Hall Agency? A. About three miles and a half.

Q. Is it that far? A. About that, I guess.

Q. How long have you lived there?

A. All my life.

Q. You have lived all your life at the place you now live? A. Yes sir. [148]

Q. How long has that land, which you now occupy, been allotted to you or been in your possession?

A. Ever since my Mother and Father died.

Q. Ever since you were a small child?

A. Yes sir.

Q. Does anybody live with you?

A. Just my foster parents.

Q. They live on your place? A. Yes sir.

Q. How many houses do you have on that place?

A. Two houses.

Q. You say there is forty acres of irrigated land? A. Yes sir.

Q. This foster father that you speak of, how old is he? A. Around about seventy, I believe.

Q. In the summer or this fall that you were hauling wood and were struck on the crossing, how much land did you cultivate and raise crops on?

(Testimony of Frank Poewee.)

A. On that forty acres.

Q. Did you have any horses or farm implements?

A. Yes sir.

Q. Tell us how many and what?

A. Three horses, and of course, my foster parents have some cattle.

Q. Did you have any plows or harrows? [149]

Mr. Casterlin: Do you mean in the entire family?

Mr. Thompson: On that place.

Mr. Casterlin: The question might not be intelligible, there are three places, one belonging to Lizzie Pokibro and one belonging to Lamar Pokibro and one to Frank Poewee, they are all separate places.

The Court: Do you understand that question?

A. Yes.

The Court: Go ahead.

Q. How many horses did you have, or how many do you have now? A. One horse to my name.

Q. How do you plow that land? How did you plow it this spring, what did you do for farm implements and horses?

A. I had to borrow the implements except a horse, and harrow.

Q. Whom did you borrow from?

A. Neighbors.

Q. The year before that, what did you do for a horse and plow? A. No sir.

Q. What did you do?

A. I had the land leased.

(Testimony of Frank Poewee.)

Q. You had your own.

The Court: He said he had the land leased.

Q. You had how much leased and to whom?

[150]

A. John Sider, forty acres.

Q. That was two or three years before the accident at the crossing?

A. That was three years before.

Q. Two years before the accident at the crossing who did you have it leased to?

A. I was working for myself.

Q. With one horse and a borrowed horse and borrowed farm implements? A. Yes.

Q. This year that you borrowed the horse whom did you borrow it from? A. My neighbors.

Q. What neighbors? A. Glen Tyler.

Q. You used that horse and your horse to plow and put in a crop? A. Yes sir.

Q. How much did you plow and how much crop did you put in? A. This year you talk about?

Q. Yes.

A. Sixteen acres barley and wheat.

Q. You didn't have any help until it came time to harvest and gather the crop, that is right?

A. Yes. [151]

Q. When you harvested the crop in previous years, before this collision, you got help at harvest time because one man cannot do it alone?

A. Yes sir.

Q. This year and last year you rented twenty acres to some Japs? A. Forty acres.

(Testimony of Frank Poewee.)

Q. In addition to that forty acres you raised sixteen acres of grain?

A. Yes, that was on Lamar's place, that is another twenty acres.

Q. But you didn't raise that?

A. I have mine leased.

Q. Now, if I understand you correctly you had gotten a load of poles for Ninip Toane and his wife on the date the accident occurred?

A. Yes.

Q. What kind of poles were they, and how much of a load did you have.

A. Quakenasp, a full load.

Q. A full load? A. Yes sir.

Q. How long were they?

A. From here to that door (indicating).

Q. From where you are to that door? [152]

A. No, not that, the next one.

Q. How many poles would you say there were?

A. I can't tell, quite a load.

Q. Let the jury know as near as you can how many there were. Were there a hundred?

A. About eighty I think.

Q. They were about how thick? At the butt or the stump end, how thick were they?

A. About that big around (indicating).

Q. About nine, ten or twelve inches through, let's say ten inches.

A. Yes, that is about right.

Q. The car had a cab, or a seat with a top over it?

A. Yes sir.

Q. The poles were back of you? A. Yes.

Q. As you approached the crossing you came

(Testimony of Frank Poewee.)

down the road alongside the railroad track toward Pocatello? A. Yes.

Q. You came down the Fort Hall side?

A. Yes.

Q. Then you had to make a right hand turn when you got to the crossing to come to this side?

A. Yes sir.

Q. How many feet away from the *tackes* was it that you made [153] that right hand turn?

A. I can't say how many.

Q. Was it as much as the width of this Court room. From this door to the back of the jury?

A. About that I guess.

Q. Would you say it was twice as wide as that?

A. No.

Q. We will pass that. How fast were you coming before you started to make the turn?

Mr. Casterlin: Objected to as incompetent, irrelevant and immaterial. (Argument of counsel reported and not transcribed.)

Mr. Thompson: I will withdraw this question but I will urge my right to examine him relative to this crossing.

Mr. Casterlin: The only material point here is: Was he struck by that train, if the answer is no, then we have no case, but if the answer is yes, that is as far as the matter goes.

The Court: Let's proceed, there is nothing before the Court, the question was withdrawn.

Q. Now, Frank, I understood you to say something about the speed of the automobile as you

(Testimony of Frank Poewee.)

started to go on the track, you did testify to that didn't you, as you went to go over the crossing?

Mr. Casterlin: He said that he slowed down [154] and shifted gears.

Q. Yes.

The Court: He may answer.

Q. Where did you slow down to shift gears?

A. Near the crossing.

Q. Then it was before you made the turn that you slowed down and shifted gears?

A. Yes sir.

Q. What speed did you slow down to when you shifted gears? A. Five.

Q. Five miles an hour. A. Yes.

Q. As you proceeded from there up to the track where you stopped, what speed did you travel at?

Mr. Casterlin: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer.

A. Just that five miles an hour.

Q. You said that Helen Toane made some statement of exclamation, is that right? A. Yes.

Q. Where was the automobile then, and what did she say?

A. We were on top of that one track and she looked to the right and said here comes a train.

Q. You were on the track then, already?

A. Yes. [155]

Q. When you left the hospital at Fort Hall, it was the 20 of November? A. That's right.

Q. You went home and didn't do anything until Spring? A. That's right.

(Testimony of Frank Poewee.)

Q. You didn't have anything you could do until spring? A. Yes.

Q. What did you have that you could do?

A. I could have done chopping wood and hauling water.

Q. Cutting wood and hauling water.

A. Yes. Lamar did most of the work at that time.

Q. Who is Lamar? Is he the man who had an interest in the automobile? A. Yes.

Q. I think you said that you do not have an automobile now, or do you?

A. I don't own any automobile now, just my foster parents.

Q. I think you said to your lawyer that you hauled wood last Winter, some, did you?

A. Yes.

Q. Where did you haul wood and how and where?

A. When was this that you talk about now?

Q. Last winter or last fall, a year ago.

A. From up in the hills.

Q. How far did you go, where was it and how far? [156] A. About eighteen miles.

Q. Where? A. Toward the east.

Q. What kind of a thing did you have to haul wood in. What kind of a vehicle, an automobile?

A. This trailer.

Q. Truck? A. Trailer.

Q. What kind of loads would you haul, about the sort that you testified to here? A. Yes.

(Testimony of Frank Poewee.)

Q. The same kind of wood? A. Yes.

Q. About the same size and length?

A. Yes.

Q. Did you come to Pocatello often before this collision? A. Yes. You mean on this truck?

Q. Yes. A. Yes.

Q. What road did you take?

A. The dirt road and sometimes on the highway.

Q. The same road that you were coming on at this time? A. Yes sir.

Q. So that you have been over that crossing a lot of times before that day?

A. Yes sir. [157]

Mr. Thompson: That is all.

Redirect Examination

By Mr. Casterlin.

Q. When did you lease your ranch to the Japanese? A. Just last spring.

Q. That is how many acres? A. Forty.

Q. Forty acres? A. Yes.

Q. Tell us again, how many acres of plow land does Lizzie Pokibro have? A. Thirty.

Q. And how many acres of plow land does Lamar have? A. Sixteen.

Q. And this plowing that you did in 1943, was that on your forty acres or on Lizzie's or Lamar's land? A. Lamar's.

Q. On his? A. Yes.

Q. The year before that what did you do with your forty acres of land?

(Testimony of Frank Poewee.)

A. Farmed the land.

Q. Who farmed Lizzie's land?

A. Some Greeks.

Q. Who farmed Lamar's land?

A. The same Japanese that have my place. [158]

Q. So that you didn't farm any of the land that belonged to Lizzie or Lamar in 1942?

A. No sir.

Q. During 1941 what did you do with your forty acres? A. I farmed my land.

Q. What did Lizzie do with her land?

A. She got her leased.

Q. What did Lamar do with his land?

A. Got his leased.

Q. That was in 1941, the year of the wreck?

A. Yes.

Q. When you testified about sixteen acres you plowed, that was on Lamar's place? A. Yes.

Q. It wasn't on your own place at all?

A. What year was this?

Q. In 1942.

A. I plowed my own land in 1942.

Q. The sixteen acres in 1943 was on whose land?

A. Lamar's.

Mr. Casterlin: That is all.

Mr. Thompson: That is all, nothing further.

Mr. Thompson: Now, Mr. Casterlin, will you stipulate that the distance from the witness chair to the entrance,—the door that the witness indicated, that it is thirty feet. [159]

Mr. Casterlin: I do not know the distance in

feet, I will leave it up to the jury to determine. They are right here.

Mr. Thompson: But you don't want to put it in the record as thirty feet.

Mr. Casterlin: But the jury knows how far it is.

Mr. Thompson: All right, if you don't want to stipulate.

Mr. Casterlin: I don't know the number of feet.

Mr. Thompson: How far would you approximate it to be?

Mr. Casterlin: I don't want to testify.

LAMAR POKIBRO

Being called as a witness on the part of the Plaintiff, after first being duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin.

Q. Your name is Lamar Pokibro. A. Yes.

Mr. Casterlin: I offer to show by this witness that he is the foster parent of Frank Poewee and that he with his wife raised Frank Poewee after the death of his natural parents; that he is the owner of the truck [160] mentioned; that he paid \$125.00 for the truck and that he put on approximately \$65.00 or \$75.00 worth of tires, and bought a battery for \$15.00 and put it in the car; that he put a box on the truck, I don't have the cost of that right here; that the total outlay on that truck within two months was \$250.00 or \$255.00 and that im-

(Testimony of Lamar Pokibro.)

mediately after the accident he sold the truck for \$35.00; that he is damaged in the amount of the difference between \$250.00 and \$35.00.

The Court: Offer rejected. He is not a plaintiff in this case, nor is the Government asking for damages on his behalf.

Mr. Casterlin: May we agree that the following offer may be made and the Court's ruling had for all intents and purposes in this action as if the witnesses named were sworn and put on the witness stand?

Mr. Thompson: That may be agreed unless there is something that I have an objection to.

Mr. Casterlin: The next witness would be Clinton Bear. He is a half-brother of Helen Toane, deceased. I propose to prove by him that he and his own blood sisters and Helen Toane were raised together as children; lived together as children, and that throughout the years they have visited back and forth, celebrated festival days together; had holiday dinners [161] together and family dinners together; that the death of Helen Toane has resulted in the loss of companionship and breaking up of the family. That her half sister and brothers who do not live in the same household have missed the associations.

Mr. Thompson: That will be objected to as incompetent, irrelevant and immaterial.

The Court: The purpose of the offer is that you are asking for damages for them on account of the loss of companionship which they had during

her lifetime, after her marriage to Ninip Toane. I think the offer will be rejected and the same ruling had. I don't think it is the measure of damages.

Mr. Casterlin: May the same stipulation and the same offer and the ruling be had as to Lillie Nagitsy; Mrs. John Tendoy; Pansy Edmo who is a full sister to Ninip Toane?

Mr. Thompson: Where do they live?

Mr. Casterlin: Pansy lives in Wyoming.

Mr. Thompson: And the others?

Mr. Casterlin: The others live in Fort Hall.

Mr. Thompson: The same objection and on the same grounds.

The Court: The same ruling.

Mr. Casterlin: I will probably have a couple more witnesses, I wonder if we may have a short recess. [162] It may shorten the trial.

The Court: We will take a recess until 10 o'clock in the morning. Admonition to the jury

10 o'clock A. M. October 19, 1943.

BILL EDMO

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Your name is Bill Edmo?

A. Yes, Bill Edmo.

Q. Where do you live? A. Fort Hall.

(Testimony of Bill Edmo.)

Q. Are you a member of the Shoshone-Bannock Tribe of Indians? A. Yes sir.

Q. Were you acquainted with Ninip Toane and Helen Toane during their lifetime? A. Yes.

Q. Were you present at any time during their funeral? A. All of the time.

Q. How long did that funeral service last?

A. Four days.

Q. Do you know of your own knowledge how many beeves were used at the funeral?

A. Yes. [163]

Q. How many? A. Two.

Q. Were you present when the same was killed?

A. Yes.

Q. Do you know the value of these animals at the time they were killed? A. Yes.

Q. What was the value?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: Unless the Government intends to connect that up with the actual payment for the beeves out of the estate or property of the deceased I think it would be incompetent. I will hear from you on that.

Q. Who owned these beeves?

A. Ninip owned one and one is mine.

Q. What was the value of the beef that was owned by Ninip Toane?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial because the funeral ex-

(Testimony of Bill Edmo.)

penses paid out of the estate are not chargeable in a suit of this kind.

The Court: I will allow it at this time, however, I will take it under advisement subject to being stricken later [164]

A. I know that both of the beef was worth \$90.00 at that time.

The Court: That answer may be stricken I don't think it is responsive.

Q. What was the value of the one belonging to Ninip Toane?

A. I think it would be just the same price.

Q. That would be \$90.00?

Mr. Thompson: He said both would be worth \$90.00.

A. Each one.

Q. Who owned the other one?

A. It was mine and one Ninip's.

Q. You owned the other? A. Yes.

Q. Was the beef which you owned used at the funeral? A. Yes.

Mr. Thompson: Do I have my objection?

The Court: Yes, you have your objection and the Court has ruled that the other beef would not be admissible unless it was connected up with the estate, as having been paid for with the property of the deceased.

Q. Did anyone pay you for your beef?

A. No.

Q. What was that worth? A. \$90.00.

Mr. Thompson: May that answer be stricken for an objection. [165]

(Testimony of Bill Edmo.)

The Court: Yes, it may be stricken.

Mr. Thompson: Now, may I have my objection to that question.

The Court: The objection is sustained.

Mr. Casterlin: At this time we offer in evidence plaintiff's exhibits numbered 3, 4, 5, 6, 7 and 8 being photographs taken at the scene of the accident on October 30, 1941, by J. H. Deal, the agricultural agent at the Fort Hall Agency.

Mr. Thompson: We have seen them and we consent.

The Court: They may be admitted.

Mr. Casterlin: That is all, you may examine.

Mr. Thompson: No cross examination.

JACOB BROWNING

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Your name is Jacob Browning?

A. Yes sir.

Q. Where do you live? A. Fort Hall.

Q. Are you a member of the Shoshone-Bannock tribe of Indians? [166] A. Yes sir.

Q. Were you acquainted with Ninip Toane and Helen Toane during their lifetime?

A. Yes sir.

(Testimony of Jacob Browning.)

Q. Do you know anything about their funeral?

A. Yes.

Q. Were you present at the funeral services?

A. Yes.

Q. Did you see the bodies of Ninip Toane and Helen Toane?

A. Yes sir.

Q. How long did the funeral last?

A. Well, under the Indian custom if any of the Indians die it lasts from three to four days that they view the body.

Q. Did you view the body of Ninip Toane?

A. Yes sir.

Q. And did you view the body of Helen Toane?

A. Yes.

Q. Did you observe how they were clothed or dressed?

A. Yes.

Q. Just explain how they were dressed?

A. They were dressed up in Indian regalia.

Q. What was the regalia they had on.

A. They had pants made by the Indians, beaded vest, neck-tie moccasins and other articles.

Q. Do you know the value of the Moccasins?

[167]

A. Yes sir.

Q. What was that?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained for the same reason that the other objection was sustained, unless counsel advises the court that he intends to connect it up,

(Testimony of Jacob Browning.)

—to show that these articles were furnished by the estate and charged to the estate.

Q. Do you know who furnished any of these articles, the moccasins, shirt and pants?

A. I don't know exactly but I think they were furnished by relations.

Q. Tell us again what you saw them dressed in?

A. Necktie, beaded vest, moccasins, beaded pants, belts, Indian beaded belts.

Q. Was that all according to the Indian custom?

A. Yes sir.

Mr. Casterlin: I think I should say at this time that I cannot assure the Court that these were paid out of the estate of the deceased. This is for the purpose of the record.

Q. Mr. Edmo, do you know the value of these different articles that you have mentioned?

A. Yes sir.

Q. What was the value of the beaded buck-skin vest which you saw. [168]

Mr. Thompson: I object to that as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Casterlin: I think that is all,—I called you Mr. Edmo, I beg your pardon, I meant to say Mr. Browning.

Mr. Thompson: May it be understood that the same objection will run to all these items, to the cost of all the articles.

The Court: Yes, and the ruling is the same and you, Mr. Casterlin, may have an exception.

Mr. Thompson: No cross examination.

TOM TYBOATS

Being called as a witness on behalf of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Is your name Tom Tyboats?

A. Yes sir.

Q. Where do you live.

A. A little west,—this side of Fort Hall.

Q. Do you live on the Fort Hall reservation?

A. Yes.

Q. Are you a member of the Shoshone-Bannock tribe?

A. Yes.

Q. Did you see,—were you acquainted with Ninip Toane and [169] Helen Toane.

A. Yes, well acquainted with them.

Q. Did you see them on October 29, 1941, the date the accident occurred on the railroad at the Fort Hall school crossing?

A. He seen the accident there, he was at the accident.

Q. Did you see Ninip Toane and Helen Toane then?

A. Yes, he seen them, all he seen was by the railroad track.

Q. At that time was Helen Toane dead or not?

A. At that time he was right by the railroad track, right by the body and he knows this, that Helen Toane took two breaths and that was the end of her.

Q. Was Ninip Toane alive at that time?

(Testimony of Tom Tyboats.)

A. Well, Ninip Toane was breathing at that time.

Q. Did you see Frank Poewee at that time?

A. He seen him too.

Q. What if anything was Ninip Toane doing when you saw him?

A. Mr. Thompson: I object to it as being incompetent, irrelevant and absolutely immaterial.

The Court: He may answer.

Q. At the time when he saw Ninip he was laying there and he didn't move, he was just barely breathing.

Q. Was there any other evidence that Ninip was alive except his breathing?

A. By the evidence that he seen, he was just barely breathing.

Mr. Thompson: There isn't any materiality [170] to this.

The Court: There isn't any question but what the Indian is dead, is there?

Mr. Casterlin: No.

Mr. Thompson: No question at all.

The Court: It seems to have little materiality.

Mr. Casterlin: I have another reason for these questions.

The Court: You may go ahead.

Q. Were there any other Indians present at the time you saw the bodies there?

A. There wasn't any other Indian at the time he was there first, but a little afterward there was another Indian arrived there in a coupe.

(Testimony of Tom Tyboats.)

Q. Was your wife there with you at that time?

A. Yes.

Q. What if anything was Frank Poewee doing?

A. He says at that time Frank he raised up. Raised himself up with one arm, kind of sat up sideways and Tom asked Frank how he was feeling.

Mr. Thompson: Object to any conversation as not being responsive.

The Court: Objection sustained.

Q. Did Frank say anything to you at that time?

Mr. Casterlin: To Interpreter, now his answer must be yes or no to this question [171]

A. He said he was feeling all right.

Q. In what condition were the bodies of Helen Toane and Ninip Toane?

Mr. Thompson: I don't want to make needless objections, but I object to this as being incompetent, irrelevant and immaterial. May I have a standing objection to this line of questioning?

The Court: The objection is sustained to this question. It has been brought out before.

Mr. Casterlin: That is all.

Mr. Thompson: That is all.

TOANE

Being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. What is your name?

(Testimony of Toane.)

A. He is known by Toane.

Q. Where do you live?

Mr. Thompson: We admit that he is a Shoshone Indian on the Fort Hall Reservation.

A. He said he is living with his daughter.

Mr. Casterlin: You admit that he is a Shoshone-Bannock Indian? [172]

Mr. Thompson: Yes.

Q. Are you related to Ninip Toane?

A. Ninip Toane is my son.

Q. Did Ninip Toane contribute to your support during his lifetime?

A. He contributed very little.

Q. Did you live with Ninip Toane at any time?

A. He lived with him part of the time some time ago.

Q. When was the last time you lived with him?

A. He doesn't remember exactly the years, it is quite a while back.

Q. When did you last see Ninip Toane, when did you see Ninip Toane the last time?

A. The last time was just before his eyes went out, that is the last time he saw Ninip himself.

Q. Do you live on the Fort Hall Reservation or over in Wyoming?

A. He is living at Fort Washakie at the present time.

Mr. Casterlin: May we agree it is in Wyoming?

Mr. Thompson: Yes.

Q. How long have you lived there?

A. He thinks about four years.

(Testimony of Toane.)

Q. During that time did Ninip Toane come to see you or to visit with you?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial. [173]

The Court: Objection sustained.

Mr. Casterlin: That is all.

Mr. Thompson: We have no cross-examination.

Mr. Casterlin: We rest.

Mr. Thompson: May it please the Court and Ladies and Gentlemen of the jury, I think without any further ceremony I will proceed to the introduction of our evidence.

LEWIS B. GRIFFIN,

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Thompson:

Q. What is your name?

A. Lewis B. Griffin.

Q. What is your occupation and where do you live?

A. 121 Rosewood, Alameda and my occupation is a brakeman.

Q. Alameda is in the suburbs of Pocatello?

A. Yes sir.

Q. Where and how were you employed on October 29, 1941?

A. Head brakeman for a freight train.

(Testimony of Lewis B. Griffin.)

Q. That was on the Union Pacific?

A. Yes sir.

Q. Who was your Engineer?

A. Mr. Moore Dick. [174]

Q. How big a train was it?

A. It was a big train, 65 or 66 cars.

Q. Do you remember an incident of a collision of the locomotive of this train and an automobile at Fort Hall, about a mile south of the Fort Hall Crossing on the evening of that day?

A. Yes sir.

Q. Just tell the jury what you saw there as your train entered upon that crossing.

A. We approached that from the north. I saw this car coming off the highway, we were quite a ways from the crossing.

Q. How far would you say?

A. Two hundred yards at least. The engineer was blowing the whistle.

Mr. Casterlin: We object to this answer as being incompetent, irrelevant and immaterial for the reason that under the law and the bond given, the railroad company is an insurer even against unavoidable accidents and the question of negligence and proximate cause when based upon the question of negligence is irrelevant and immaterial.

The Court: I will permit the witness to answer at this time with the understanding that the Court will take this line of questioning under advisement and will later order it stricken if I determine it is incorrect. [175]

(Testimony of Lewis B. Griffin.)

Mr. Casterlin: May it be understood that the objection runs to all questions and answers respecting matters connected with the defense of, and on the ground of proximate cause?

The Court: It *may so* understood and the Court will permit the answers with the understanding that the Court is taking the matter under advisement and will rule on the admissibility of the testimony before the close of the case.

Q. Describe the blowing of the whistle and what kind of a whistle it was and where he began to sound it?

A. He began to sound it at the whistling board.

Q. How far is that from the crossing?

A. About thirteen hundred feet.

Q. Can you give the jury some idea of how much whistling he did between the whistling board and reaching the crossing?

A. He was whistling continuously,—he just blasted the whistle I should say four at least,—four long blasts of the whistle and the bell was ringing.

Q. You started to tell us that you saw an automobile turn off the road or something, where did it turn and what did it do?

A. It was coming south on the highway parallel with the railroad, and he turned into this road up to the railroad and at the time I couldn't tell whether he was going to stop or go on across. He had time to [176] go across I think but he drove up and stopped with the cab right on the railroad track.

(Testimony of Lewis B. Griffin.)

Q. Do you know what the engineer did as he drove upon the track?

A. He went to the emergency with his brakes.

Q. What does the emergency mean?

A. He gave it all the braking power you possibly have.

Q. Was there anything between you or your engine and the automobile or the driver of the automobile at the time the automobile driver made the turn to the west toward the railroad track and from then on until he drove upon the track?

A. No sir, nothing in the way. I could see him very plainly, that is, I could see the car.

Q. Was there anything anywhere in there between the highway that parallels the track on the east and the railroad track for a half mile north from the crossing?

A. No sir, I don't think there is anything there.

Q. How fast was the train moving, about, when this man made the turn and drove upon the track?

A. I should judge between 37 and 42 miles an hour, along in there someplace.

Q. Were there any lights on the locomotive?

A. Yes sir, the headlight was burning.

Q. What kind of a headlight?

A. An electric headlight. [177]

Q. Bright or dim? A. Bright.

Mr. Thompson: That is all.

(Testimony of Lewis B. Griffin.)

Cross Examination

By Mr. Casterlin:

Q. You testified that he stopped the cab of the automobile right on the track, who did you mean by he? A. Whoever the driver was.

Q. How do you know that he stopped the car?

A. Well, the car stopped.

Q. Do you know why the car stopped?

A. I spoke to him and he told me that it stalled.

Q. Then you intended to say that the automobile stalled, and not that he deliberately stopped it?

A. I cannot say that.

Q. He told you that the car stalled on the track.

A. I understood him to say that.

Q. Well, that is what he told you?

A. Yes, that is what he told me.

Q. And that is what it looked like to you?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion.

Mr. Casterlin: Withdraw the question.

Q. Where is this headlight on the engine?

A. On the front end. [178]

Q. Where were you?

A. On the brakeman's seat in front of the fireman, I could see it all.

Q. You were sitting in the brakeman's seat in the cab? A. Yes sir.

Q. Looking into the headlight?

A. I could see the reflection of the headlight.

Q. You could say it was on bright?

(Testimony of Lewis B. Griffin.)

A. I could see the automobile all right.

Q. What time was it?

A. It was between dusk and dark.

Q. You could see the automobile without light?

A. Not as plain.

Q. How could you say the headlight was burning bright?

A. They always burn that way.

Q. How could you say that it was bright?

A. It was as good as any I ever rode behind.

Mr. Casterlin: That's all.

Redirect Examination

By Mr. Thompson:

Q. Which side of the cab were you on?

A. The left hand side.

Q. Which side was the engineer on?

A. The right hand side.

Mr. Thompson: That is all.

Mr. Casterlin: Yes, that's all. [179]

MORRIS LOWELL DICK

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Thompson:

Q. What is your full name?

A. Morris Lowell Dick.

Q. Where do you live?

A. 224 West Sublet.

(Testimony of Morris Lowell Dick.)

Q. Pocatello, Idaho? A. Yes sir.

Q. You are a little hard of hearing?

A. No, but I have a cold and it does affect me at the present time.

Q. What is your occupation?

A. Locomotive engineer.

Q. How long have you been an engineer?

A. Since August 1912.

Q. By whom have you been employed during that time?

A. The Union Pacific and the Oregon Short Line.

Q. Generally on what division?

A. On the Montana division at that time.

Q. Where does that run?

A. Between Pocatello and Butte.

Q. On the afternoon of October 29, 1941 in the late afternoon, [180] between five and six o'clock that day, where were you and what were you doing?

A. I was on 278 coming east.

Q. What was 278?

A. That is a regular freight train coming east.

Q. When you say coming east, is that according to compass directions or railroad directions?

A. Railroad direction.

Q. And according to compass direction how was it? A. It would be south.

Q. Do you recall an accident or collision between your engine and an automobile, or between an automobile and your engine at the crossing about a mile south of Fort Hall, that day? A. Yes sir.

(Testimony of Morris Lowell Dick.)

Q. Did you state that you were the engineer in charge of that locomotive and operating it?

A. Yes sir.

Q. Tell us what you saw and what you did as you approached that crossing.

Mr. Casterlin: At this time we make the same objection to the testimony of this witness as to the last one. We understand that it runs to all testimony which goes to the fourth defense in this action, and we make it on the grounds heretofore stated.

[181]

The Court: The same ruling.

A. Approaching that crossing I had passed the whistling post and, of course, had the bell ringing. I was whistling for the crossing and about the time that I was whistling the second time I saw the light of the automobile come up on the crossing and stop. The headlight seemed to be in about a line with the right rail. I thought for a second or two that he was going over and when I saw that he didn't move I placed the brake in emergency, opened the sander and finished whistling in short blasts.

Q. You said that the headlight was in line with the right rail, what headlight did you mean?

A. The automobile headlight.

Q. What do you have to say about your own headlight?

A. It was on bright and in good shape.

Q. When you apply the brake in emergency, what do you mean?

(Testimony of Morris Lowell Dick.)

A. I mean that you obtain all the braking power that is possible on that train.

Q. Was there anything that you might have done that you didn't do to avoid the collision?

A. No sir.

Q. After you saw the automobile?

A. No sir, there wasn't.

Q. At what speed were you traveling as you observed the automobile or its headlights? [182]

A. About forty miles an hour.

Q. Who was your fireman?

A. A fellow by the name of Pixton.

Q. Have you seen him of recent times, or for several months past? A. No sir, I haven't.

Mr. Thompson: Will you take my statement for the record that the fireman Pixton,—that our last advice is that he was in the State of Washington.

Mr. Casterlin: Yes, I will accept that statement.

Mr. Thompson: You may examine, that is all.

Cross Examination

By Mr. Casterlin:

Q. Were you with Mr. Griffin when he talked to the driver of this car? A. Yes sir.

Q. What did the driver tell you, if anything, happened when he drove on to the track?

A. He said the car stalled.

Q. The car having stalled on the railroad track and your engine and train coming as you have de-

(Testimony of Morris Lowell Dick.)

scribed, isn't it a fact that the accident was unavoidable?

Mr. Thompson: Objected to as seeking to establish a legal question.

The Court: I think that is a question [183] for the jury.

Q. How long have you been railroading?

A. For thirty-six years.

Q. Have you ever had any accident before?

A. Yes sir.

Q. You understand what we mean by accident?

A. Yes, I think I do.

Q. Do you have an opinion as to whether this accident on October 29, 1941 was an unavoidable accident or not? You can answer that question yes or not.

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial, it calls for an opinion and not a fact.

The Court: He may answer that yes or no.

Q. Yes, just answer that yes or no.

A. If I understand it is this way, could this have been avoided?

Q. Do you have an opinion as to whether the accident was unavoidable or not?

Mr. Thompson: I submit that counsel should answer the witness' question.

The Court: If you don't understand the question you may say so.

A. Does he mean that this accident could have

(Testimony of Morris Lowell Dick.)

been avoided or could not have been under the circumstances? [184]

Q. Do you have an opinion as to that?

A. Not on my part it couldn't.

Q. With their engine stalled on the track could it have been avoided from their standpoint?

Mr. Thompson: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion or opinion of the witness.

Mr. Casterlin: Withdraw the question.

The Court: He can testify as to what he observed, but you have withdrawn the question.

Q. Based upon your experience as an engineer and a train man, do you have an opinion as to whether this accident could have been avoided at all under the circumstances of the automobile being stalled on the track?

Mr. Thompson: We object to this, it is all covered by the previous question, the objection and the ruling of the Court. It is repetition.

The Court: I think the witness has answered. However, I will permit him to answer again.

Q. Do you have an opinion?

A. He could probably have gotten that car off, but I don't know.

Q. You say he could have gotten the car off. How long was it between the time that the car stalled and the time when the accident occurred?

A. About twelve to fourteen car lengths. [185]

Q. How long would it take 12 or 14 cars to pass that distance? A. I didn't figure that out.

(Testimony of Morris Lowell Dick.)

Mr. Thompson: I have a table here to figure it if you would like it.

Q. I call your attention to exhibit 8 and I will ask you to state whether or not in your opinion the occupants of that car could have gotten out, with a stalled engine and moved that car off the track by hand and avoided the accident?

Mr. Thompson: I object to that as not proper cross examination.

The Court: Yes, I think we are going too far afield. The objection is sustained.

Mr. Casterlin: That is all.

Mr. Thompson: Yes, that is all.

Mr. Casterlin: I will accept that statement of computation at this time.

Mr. Thompson: According to the table which I have and upon which I rely.

Mr. Casterlin: We will both rely on it.

Mr. Thompson: At forty miles an hour an object traveling at 40 miles an hour covers 58.67 feet of space per second.

Mr. Casterlin: That is at 40 miles an hour?

Mr. Thompson: Yes. [186]

MRS. UNA JONES

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Thompson:

Q. What is your name, please?

A. Una Jones.

Q. You are perhaps thirty-five or forty years old?

A. Yes sir.

Q. Where do you live?

A. One mile south of Fort Hall, Idaho.

Q. Do you remember the occasion of the collision between a locomotive, or engine and an automobile on the evening of October 29, 1941, at a crossing about a mile south of Fort Hall?

A. Yes sir.

Q. Where is that crossing with reference to your home?

A. My home is a quarter of a mile Northwest.

Q. On the west side of the track?

A. Yes sir.

Q. Would you say that it is approximately due northwest from the crossing?

A. Yes sir.

Q. Is that a quarter of a mile by road?

A. By road. [187]

Q. The shortest distance is what, between these points?

A. One half of that distance, I figure almost half.

Q. Did you observe the train as it approached the crossing?

A. Yes sir.

(Testimony of Mrs. Una Jones.)

Q. Did you hear any signals as it approached the crossing?

Mr. Casterlin: The same objection to this as I made to the other questions as to the fourth defense.

The Court: The same ruling.

A. Yes sir.

Q. Tell the jury what signals, if any, you heard from the engine.

A. Well I heard signals that were different that the signals that I always heard, that is what drew my attention.

Q. Would you say how far the engine was from the crossing when you first was conscious of its whistling?

A. I would say the length of two telephone poles.

Q. Two pole lengths.

Q. When I turned away quit looking I guess it was about one car length from the crossing.

Q. Did you observe the actual impact?

A. No sir.

Q. Tell us what you observed about the automobile.

A. I saw the headlights of the automobile when I heard the whistle, and it was different than the whistle for cattle on the crossing. I think he was trying to warn that automobile from pulling up in front. [188]

Q. Where was the automobile when you first saw it?

(Testimony of Mrs. Una Jones.)

A. Kind of coming toward me on the other side of the track.

Q. Did you observe what the automobile was doing when you saw it?

A. It was traveling when I first saw it.

Q. Your name is what? A. Una Jones.

Q. Are you married? A. Yes sir.

Q. Does your husband work for the railroad company? A. No sir.

Mr. Thompson: That is all.

Mr. Casterlin: No questions.

WYNN McCURDY

Being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Thompson:

Q. What is your name?

A. Wynn McCurdy.

Q. How old are you? A. Sixty-two.

Q. Where do you live? A. Blackfoot.

[189]

Q. Have you made any measurements of any distance within this Court room, and if so when?

A. Yes, I have. This morning.

Q. With what did you make that measurement?

A. With a tape line.

Q. Have you that tape line with you

(Testimony of Wynn McCurdy.)

Mr. Casterlin: We don't object to that.

Q. What measurement did you make?

A. From the edge of this chair to the center of that door (indicating).

Q. What was the measurement?

A. Thirty-six feet and six inches.

Q. What chair do you mean?

A. This witness chair.

Q. And the center of the door is the rear of the two doors, the ones back of the rail in the court room?

A. That would be the door, and the other measurement was across the center of the building, that was 27 feet.

Q. You measured from a point back of the jurors? A. Right by that rail (indicating).

Q. That is the same distance as the back of the jurors to the other wall? A. Yes sir.

Q. That was 27 feet? A. Yes sir. [190]

Q. What was your employment on October 29, 1941? A. Section foreman.

Q. Where? A. Fort Hall.

Q. How long had you been employed as Section Foreman? A. At Fort Hall?

Q. At any place.

A. At that time about twenty-six or twenty-seven years.

Q. You had been section foreman for 26 or 27 years? A. At that time, yes sir.

Q. Was the track at that point under your supervision? A. Yes sir.

(Testimony of Wynn McCurdy.)

Q. When had you last been over it, before this collision? A. That day,—that morning.

Q. Did you observe its condition?

A. Yes sir.

Q. What was its condition, at the crossing?

A. It was good.

Q. Describe to the jury how it was constructed.

A. Between the rails it is fully planked and on the outside one 12 inch plank on the outside of each rail, and the approach, I can't say for exactly the number of feet, is level, with a little bit of an incline on both sides.

Mr. Thompson: That is all.

Mr. Casterlin: No questions.

Mr. Thompson: That is all, the defense rests.

[191]

The Court: At this time I think we will recess until 1:30. Admonition to the jury.

1:30 P.M. October 19, 1943.

The Court: The matters that the Court took under advisement regarding the fourth defense will be allowed to stand, and the motion to strike denied, and the questions and answers objected to will be allowed to stand and the objection overruled.

FRANK POEWEE

Being called in rebuttal on the part of the plaintiff, having been duly sworn testifies as follows:

Direct Examination

By Mr. Casterlin:

Q. Your name is Frank Poewee? A. Yes.

Q. You are the same person who testified before in this action? A. Yes.

Q. Did anything happen to your automobile when you had driven it on the railroad track at the school crossing on the Fort Hall Reservation on October 29, 1941? A. Yes.

Q. What was that?

A. The car stalled and I couldn't get it to go.

Mr. Casterlin: That is all. [192]

Cross Examination

By Mr. Thompson:

Q. I believe you said yesterday that Helen Toane said "here comes a train" or "here is a train."

Mr. Casterlin: Objected to as not proper cross examination at this time, and not pertaining to any question asked in rebuttal. The only question asked here was whether the car was stalled.

The Court: He may answer.

A. Yes.

Q. Where was your automobile at that time?

Mr. Casterlin: Objected to on the same ground.

The Court: He may answer.

A. Just on that one track.

Q. On the first rail, the first track?

(Testimony of Frank Poewee.)

A. Yes.

Q. And then your automobile stalled?

A. Yes.

Q. Now, what kind of an automobile was this?

A. 1935 Chevrolet, a Chevrolet truck, no, it was 1934.

Q. 1935 Chevrolet truck? A. No, 1934.

Q. And it had been bought as a second hand, used car by someone up there? A. Yes. [193]

Mr. Thompson: That's all.

Mr. Casterlin: That's all, and the plaintiff rests.

Mr. Casterlin: At this time the Government having rested and the defense having rested, I move to have stricken the fourth defense to all of the causes of action on the ground that the same is not a defense to this action and all the evidence in respect thereto is incompetent, under the law and the facts of this case.

The Court: The motion will be denied.

Mr. Thompson: The defendants move for a directed verdict in favor of the defendants upon the ground that the collision and consequences thereof were not proximately caused by anything that the Railroad Company or its employees in the operation of the train did, or could have anticipated or avoided. But that the sole proximate cause was the act of the driver of the auto attempting to cross the track with a large load of long poles in the immediate presence of a rapidly approaching train, which train he could and should have seen if he looked therefor, as he was bound to do, and could

and should have heard the whistles and bell thereof if he had listened therefor, as he was bound to do, and seeing and hearing give precedence of passage to, and but for which the collision would not have occurred. [194]

That the collision was not the result of inevitable accident, because it was the duty of the driver to stop his auto and give precedence to the train, the headlights of which was in plain view and the signals of which were being sounded: On the contrary it was inevitable risk.

The Court: The motion is denied.

Mr. Thompson: And we will take an exception.

Instructions To The Jury

The Court: Ladies and Gentlemen of the jury: I shall avoid doing anything more than to attempt to bring to your attention a brief statement of the pleadings and a bare outline of the real issues and principles of law which are applicable here.

The issues before you are *quiet* simple and as counsel have during the trial, and in their argument, gone into the matter rather fully, it will not be necessary for me to go into detail as to the claims of the respective parties.

The issues are made up of the plaintiff's complaint, and the answer of the defendant Union Pacific Railroad Company.

The action is brought in the name of the United States of America for and on behalf of the Shoshone and Bannock tribes of Indians, for damages [195] alleged to have accrued by reason of the kill-

ing and maiming of certain Indian persons; the complaint alleges proper jurisdiction of this Court and calls attention to a certain Act of Congress; they allege in the complaint, the corporate capacity of the Oregon Short Line Railroad Company, and that it is the successor of the Utah Northern Railway Company; they also allege the corporate capacity of the Saint Paul Mercury Indemnity Company, also their right to do business in the State and District of Idaho. Plaintiffs allege that on July 3, 1868 at Fort Bridger in the Territory of Utah, a certain treaty was entered into between the United States of America and the Shoshone and Bannock tribes of Indians,—this has also been explained to you by counsel for the respective parties. It is alleged in the complaint that the Fort Hall Indian reservation was referred to in the treaty which I have mentioned. It is further alleged that as a consequence of the treaty mentioned and certain Acts of Congress, the predecessor of the Oregon Short Line Railroad Company was permitted to construct and operate a railroad across the Fort Hall reservation providing that the railroad Company, its successors and assigns, execute a bond in the penal sum of \$10,000 for the use and benefit of the Shoshone and Bannock tribes of Indians, the conditions of the bond being [196] by statute provided as follows: “That said railway Company shall execute a bond to the United States to be filed with and approved by the Secretary of the Interior in the penal sum of \$10,000 for the use and benefit of *of* the Shoshone and Bannock Tribes

of Indians conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes or either of them or of their livestock, in the construction or operation of said railway or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any Court of the territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States:" It is alleged that the memorandum agreement is contained in the Act of Congress of September 1, 1888.

It is further alleged that the Oregon Short Line Railroad Company is the successor of the Utah Northern Railway Company and that at all times mentioned in the Complaint as being material to this cause of action, maintained and operated a railroad across the Fort Hall Indian reservation.

It is also alleged that for the privilege of [197] maintaining and operating the railroad that the Oregon Short Line Railroad Company executed and delivered to the United States for the use and benefit of the Shoshone and Bannock tribes of Indians and parties in interest, a certain bond as required, in the sum of \$10,000—and the bond is set out and made a part of the plaintiff's complaint. It is also alleged in the complaint that by reason of the bond and the laws applicable thereto, the

railroad Company and Bonding Company became obligated in the event any member of the Shoshone and Bannock tribes of Indians were killed or maimed, to make due payment for all damages accruing therefrom; and that the defendants agreed and promised according to the terms of the bond to make payment for any and all damages accruing by the killing or maiming of any Indian belonging to either of the tribes mentioned.

It is further alleged that on the 29th day of October 1941, the Union Pacific Railroad Company as successor, assignee or lessee of the defendant Oregon Short Line Railroad Company, while operating a railroad train over, through and across the Fort Hall Indian Reservation at a point where the railroad crosses what is known as the school railroad crossing which have been described to you in the testimony here, on the Fort Hall Indian reservation, in the County of Bingham, [198] State and District of Idaho, ran the railroad train into and upon a certain automobile occupied by Ninip Toane, Heler Toane and Frank Pooewe, said persons being Indians and members of the Shoshone and Bannock tribes of Indians residing on the Fort Hall Reservation, for whose benefit the treaty agreement, special Act and Bond mentioned were made, passed, exacted and executed, and being wards of the United States Government, having a right to be on the Fort Hall Reservation at the place and point where the Indians were maimed and killed; that the railroad train operating as mentioned in the complaint, did run into and cause such serious injury as to result

in the death of Ninip Toane and Helen Toane his wife; and cause severe and permanent injuries to Frank Pooewe in that the train did cut, bruise and injure Frank Pooewe in and about his head, legs and body and did otherwise inflict injury to Frank Pooewe resulting in pain and suffering and both temporary and permanent disability. It is also alleged that the defendants refused to make an amicable settlement or any settlement with the parties in interest as required by the bond and provisions of the Act of Congress, and it is further alleged that demand for payment has been made; and it is alleged that the funeral expenses incurred for the burial of the Indian persons killed [199] was approximately \$2,000 and it is further alleged that by reason of the death of the two Indians Ninip Toane and Helen Toane and the injuries to Frank Pooewe that the parties in interest have sustained damages in the sum of \$10,000 and the plaintiff asks for damages against the defendant jointly in that amount.

In the second count of the complaint the plaintiffs set forth the allegations as to the corporate existence of the companies, the bond given and executed, and Acts of Congress, the construction and operation of the railroad across the reservation, and the cause of the death of Ninip Toane, individually and alleging the expense of the funeral to be \$1,000 and asks for damages for the death of Ninip Toane in the sum of \$10,000.

In the third count of the complaint the same allegations are made as to the cause of the death of Helen Toane and plaintiff asks for damages in the

sum of \$10,000 by reason of the death of Helen Toane.

In the fourth count of the complaint the same allegations are made except that plaintiff alleges the serious injury of Frank Pooewe and asks for damages by reason of such injuries in the sum of \$10,000. Plaintiff asks for their costs and disbursements in each count of the complaint. [200]

The defendants have filed their answer to the complaint and have admitted the Acts of Congress, the execution and delivery of the bond; the corporate existence of the various companies; admit that the Oregon Short Line Railroad Company is the successor of the Utah Northern Railway Company, and admit that it operated trains across the Fort Hall Indian Reservation; admit that the railroad train collided with an automobile in which Helen Toane, Ninip Toane and Frank Pooewe were riding, and admit that the Indians were rightfully upon the reservation but deny that they were rightfully upon the railroad crossing at the time of the collision and admit that Helen Toane and Ninip Toane were seriously injured from which injuries they died; admit that Frank Pooewe sustained a bruise on his head and a fractured rib resulting in temporary but not great suffering, and resulting in a brief temporary disability; the defendants deny that the funeral expenses amounted to \$2,000 and deny that any expenses were incurred as funeral expenses in excess of \$145.00.

By way of separate and distinct defense the defendants allege that at the time and place of the

collision described in the complaint, the engine and cars of the train were approaching the highway crossing described, on a track that was straight and level; [201] with the headlight of the engine burning brightly, and the bell of the engine being sounded and that the train and headlight of the engine and the engine were in plain view of the Indians described in the complaint continuously for at least three quarters of a mile before the engine reached the highway crossing and could have been clearly seen before they drove upon the railroad track and in the path of the train if they had looked while in a safe place and at a safe distance, and that it was their duty to do so at any time and point after they were within two hundred feet of the railroad crossing, and they further allege that the whistle and bell of the engine could have been clearly heard by the Indians before they drove upon the track or within two hundred feet or any intermediate point before entering upon the track if they had listened; and they neither looked or listened but drove upon the railroad track and stopped the vehicle in which they were riding when the locomotive engine was so close to the crossing that those in charge of the train and engine could not avoid colliding with the said vehicle, and it is alleged that the collision was due solely to the acts and omissions of the Indians which acts and omissions were the sole proximate cause of the collision.

The same admissions, denials and defenses [202] are made to each of the counts of the complaint.

The defendants ask that they be dismissed with their just costs and disbursements incurred.

If in your deliberations you should come to the consideration of damages. You will take into consideration the evidence admitted and the instructions of the Court as to the law. If you conclude that the plaintiff is entitled to damages, in no event will you allow any greater amount than prayed for, that is; in no event should your verdict be for an amount greater than \$10,00 by reason of the death of Ninip Toane; \$10,000 by reason of the death of Helen Toane and \$10,00 by reason of the injuries to Frank Poewee.

You are the sole and exclusive judges of the evidence and the credibility of the several witnesses and of the weight to be given to the testimony. In weighing the testimony of the witness you have a right to consider his demeanor on the witness stand, the fairness or lack of fairness, frankness or lack of frankness, his interest or lack of interest in the result of the trial and any other fact or circumstance arising from the evidence which appeals to your judgment as in anywise effecting the credibility of such witness and to give to the testimony of the several [203] witnesses just such degree of weight as in your judgment it is entitled to.

If you should feel that the Court has any opinion as to what the evidence shows, you will not consider that in any sense, that is entirely your responsibility, and as I have told you, you are the sole judges of the evidence and the credibility of the

witnesses and the weight to be given the testimony.

You are instructed that the Act of Congress and particularly the Act of September 1, 1888, 25 Stat. 452, evidences a policy of exacting from the railroad Company, indemnification for any and all damages to life and property of the Indians accruing out of the operation of the railroad within the reservation. This statute contemplates and requires the payment of damages independent of negligence, also requires the payment of damages if the loss was occasioned by an inevitable and unavoidable accident. It does not contemplate and require the payment of damages if the acts of the parties complaining was the proximate cause of the injury. With this exception the acceptance of the burden was an express or implied condition of the granting of the right-of-way of the railroad company over and across the Fort Hall Indian Reservation. [204]

You are told that the proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred.

The Jury is instructed that in their popular sense, the words used in the Act of Congress of September 1, 1888, 25 Stats., 452, reasonably imported the broad purpose of saving the Shoshone and Bannock tribes of Indians residing on the Fort Hall Reservation harmless and of insuring them against loss occasioned by inevitable accidents.

The jury is instructed that by the Act of Congress of September 1, 1888, 25 Stats. 452, the Rail-

road Company indemnifies the Shoshone and Bannock Tribes of Indians of the Fort Hall Reservation against any and all damages which may accrue to said tribes, or either of them, or of their livestock, in the construction or operation of said railroad or by reason of fires originating thereby; and is an insurer in respect to such damages, the only exceptions to this rule would be where the acts of the parties complaining was the proximate cause of the accident as explained elsewhere in these instructions. [205]

You are instructed that the statute upon which this suit is based provides with respect to persons who have been killed and that monies recovered in such suits shall be placed into the Treasury of the United States to the credit of the particular Indians entitled to the same, and be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior. From this it follows, and you are so instructed that there can be no award to or recovery of damages by the tribe in this suit, but whatever award, if any, shall be made must be limited to damages proven to have been sustained by individual members of the tribe within the rules of law stated elsewhere in these instructions.

The right to recover damages because of the death of Ninip Toane and Helen Toane is limited to the reasonable expectation of pecuniary benefits to particular individuals that may be proven in this case. If you find that no individual was deprived of a reasonable expectation of pecuniary benefits on account of the death of Ninip Toane or Helen Toane

you will not award any damages to anyone on account of the death of either of them. There can be no recovery by or on behalf of anyone for the death of Ninip Toane or [206] Helen Toane on account of grief or mental anguish or loss of the society or companionship of either of said persons. Mere blood relationship does not afford any basis for the award of damages. Elements of damage within the realm of possibility but not fairly shown to be reasonably probable do not form the basis for an award of damages.

The Court charges you that there can be no recovery in this suit for damages to or destruction of the automobile.

In the event that you shall award damages for funeral expenses they must be limited to such expenses as have been paid by the beneficiaries, or for which they are liable, provided the reasonable value thereof is shown, and provided it appears that the amounts charged are reasonable.

You should disregard any statement of counsel for either side, if any were made during the trial or the argument in this case which are contrary to, or not in accord with your recollection of the evidence and you will also disregard all evidence which may have been offered by either side and not admitted in evidence, [207] and also it is your duty to disregard any evidence which may have been ordered stricken from the record.

In this Court it is necessary that all jurors concur in finding a verdict, even in a civil case of this character. Forms of verdicts have been prepared for you and you will have no difficulty in using

them. If you find in favor of the plaintiff and against the defendants, you will insert in the blanks left for that purpose the amounts you find the plaintiff is entitled to recover. If you find in favor of the defendants you will use the form in which there is no blank left.

When you retire to your jury room you will elect one of your number as foreman, and when you have arrived at a verdict it will be signed by your foreman alone and returned into open Court.

The Bailiff will be sworn and you will retire to consider your verdict.

Mr. Casterlin: Comes now the plaintiff before the jury has retired to consider their verdict and in the presence of the jury, and excepts to the following instructions, beginning with the words: "By way of separate and distinct defense the defendants allege * * * * *" and continuing thence to the words: "The same admissions, denials and defenses are made to each of the counts of the complaint." [208]

Plaintiff excepts to that part of the instructions beginning with the words: "It does not contemplate and require the payment of damages if the acts of the parties complaining was the proximate cause of the injury,—" and ending with the words: "* * * over and across the Fort Hall Indian Reservation."

Plaintiff further excepts to the following instruction given by the Court: "You are told that the proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by

any new cause, produces an event, and without which the event would not have occurred.”

Plaintiff excepts to the following instruction or portion of instruction given by the Court: “* * the only exceptions to this rule would be where the acts of the parties complaining was the proximate cause of the accident as explained elsewhere in these instructions.” This is the latter part of an instruction given by the Court beginning with: “The jury is instructed that by the Act of Congress of September 1, 1888, 25 Stats. 452, the railroad company indemnifies the Shoshone and Bannock tribes of Indians * * * *” and so forth.

Plaintiff excepts to that part of the instructions given by the Court, beginning with the words: “The right to *recovery* damages because of the death of [209] Ninip Toane and Helen Toane is limited to the reasonable expectation of pecuniary benefits to particular individuals that may be proven in this case. * * * *” and ending with the words: “* * * * Elements of damage within the realm of possibility but not fairly shown to be reasonable probable do not form the basis for an award of damages.” And also excepts to the *follows* instruction of the Court: “The Court charges you that there can be no recovery in this suit for damages to or destruction of the automobile.”

The Plaintiff further excepts to the following instruction given by the Court: “In the event that you shall award damages for funeral expenses they must be limited to such expenses as have been paid by the beneficiaries, or for which they are liable,

provided the reasonable value thereof is shown, and provided it appears that the amounts charged are reasonable.”

For the reason that the defense of the defendants designated in the answer as the fourth defense is not a legal defense to this action under the law and the facts in this case. For the reason that proximate cause is not a defense to this action, and the facts alleged to be the proximate cause are all matters of negligence and not within the purview of the special Act of September 1, 1888 and the bond executed in connection therewith. That proximate cause not being a defense to this action [210] therefore the definition of the term proximate cause is improper. That there is no exception whatever to the provisions of the Act of September 1, 1888 requiring the payment of all damages which may accrue to the said tribes or either of them or their livestock by the construction or operation of the railroad or by fires originating thereby and the railroad is an insurer against all damages of every kind and description accruing to the Shoshone or Bannock tribes or any member thereof by reason of the construction and operation of the railroad through the reservation, pursuant to the Act of September 1, 1888.

For the reason that the right to recover damages for the death of any Indian is not limited to the reasonable expectation of pecuniary benefits of or to particular individuals, and the rules for determining damages in the ordinary cause for personal injury or death do not apply in this action, which is

predicated upon a treaty with the Shoshone and Bannock Indians and also a particular Act of Congress defining the rights and obligations of the respective parties named therein, and

For the reason that the automobile referred to in the instructions and concerning which testimony was introduced in this action is and was property of Indian ward of the Government and a member of the Shoshone-Bannock tribe of Indians, and the pleadings in this case [211] fortified by a bill of particulars set forth a claim for damages by reason of the destruction of the automobile.

Also for the reason that the funeral expenses are damages within the meaning and purview of the Act of September 1, 1888, for which the defendants are liable and an appropriate Indian funeral having been conducted in accordance with Indian custom and practice.

The reasons for the objections here stated refer to the instructions excepted to and each and every thereof.

The Court: The objections are overruled. and of course, you may have your exceptions.

Mr. Thompson: Come now the defendants in the presence of the Court and jury, immediately following the charge of the Court to the jury and before the jurors have retired to consider their verdict and excepts to the following instructions and portions of instructions given by the Court to the jury: “**If you conclude that the plaintiff is entitled to damages, in no event will you allow any

greater amount than prayed for, that is; in no event should your verdict be for an amount greater than \$10,000 by reason of the death of Ninip Toane; \$10,000 by reason of the death of Helen Toane, and \$10,000 by reason of the injuries to Frank Poewe." The exception being based upon the ground that under the bond and statute, the maximum liability on the bond and [212] statute upon which it is based in this suit is limited to a total aggregating the sum of \$10,000 and this, by the instruction is given is exceeded by \$20,000.

The defendants except to the following instruction given by the Court, following the reference to the Act of September 1, 1888, and given in the following words: "**** This Statute contemplates and requires the payment of damages independent of negligence, also requires the payment of damages if the loss was occasioned by an inevitable and unavoidable accident." Upon the ground that it is not within the theory, language or spirit of the bond or the statute that the Railroad Company or the surety should be required to pay damages for loss occasioned by an inevitable accident or an unavoidable accident.

The defendants except to the following instruction given by the Court: "The jury is instructed that in their popular sense, the words used in the Act of Congress of September 1, 1888, 25 Stats. 452 reasonably imported the broad purpose of saving the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Reservation harmless, and of insuring them against loss occasioned by inevi-

table accident." Upon the ground [213] that neither the language of the statute or the bond given pursuant thereto import either in language or in law an obligation tantamount to or constituting insurance against loss, and does not insure against loss occasioned by an inevitable accident and such is not the literal or legal purpose or intent of the language or spirit of either the statute or the bond.

Upon the same grounds and for the same reasons the defendants except to the following language used in the instructions of the Court: "****The jury is instructed that by the Act of Congress of September 1, 1888, 25 Stats 452, the railroad company indemnifies the Shoshone and Bannock tribes of Indians of the Fort Hall Reservation against any and all damages which may accrue to said tribes or either of them, or of their livestock, in the construction or operation of said railroad or by reason of fires originating thereby; and is an insurer in respect to such damages." and particularly excepts to the following words: "and is an insurer in respect to such damages."

The defendants except to the refusal of the Court to give the following instruction requested by the defendant, designated as defendants' requested instruction number 1, reading as follows: "You are instructed in [214] this suit that the defendant were required to and did give a bond to secure the payment of such damages as might accrue as a result of killing or injuring members of the Shoshone and Bannock Indians on the Fort Hall Reservation. You are further instructed that damages do not accrue

for the killing or injuring of a person without negligence or other fault, and since no negligence on the part of either of the defendant railroad Companies is established there is no liability on the bond, and you are directed to render a verdict against the plaintiff and in favor of the defendants." Upon the ground that the statute provides only for the giving of a bond for the recovery of damages which may accrue to the Indians; and that damages do not accrue without wrong on the part of the party complained of, nor under the language or purpose of the statute and the bond except by fault or negligence or invasion of the legal right by the party charged.

The defendants except to the refusal of the Court to grant their sixth request, reading as follows: "The Court calls your attention to the fact that the plaintiff has seen fit to, in a sense, repeat its asserted right of action by restatement of substantially the same thing in several counts. You should not be [215] misled by this into assuming, if you should find in favor of the plaintiff, that you should restate or repeat or multiply any items of damage. All that the plaintiff is entitled to by way of a verdict, in the event that you shall award any sum to the plaintiff, is, first a single assessment or item of damages on account of the death of Ninip Toane and Helen Toane, and second a single assessment or item of damages on account of injuries, if any, to Frank Pooewe." Upon the ground that the limit of the bond and the obligation arising under

and from the Statute and bond does not exceed the total sum of \$10,000.

Defendants except to the refusal of the Court to grant their requested instruction number seven reading as follows: "You are instructed that the law of Idaho requires travelers upon the highway and about to cross a railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the tracks. It is also the duty of the traveler to give way for the passage of trains and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears." Upon the ground that the failure of the [216] driver of the automobile and the other occupants to observe this law which was binding upon them was the proximate cause of their injuries, or if not the proximate cause of their injuries, as a matter of law, was a proper subject for the consideration of the jury.

Defendants except to the refusal of the Court to grant their requested instruction number 9, the first paragraph of which consists of a definition of proximate cause concerning which no complaint is made but the second paragraph applies the definition to hypothetical facts or assumed facts in such a way as to enable the jury to make an application of the principle of law involved, in place of merely furnishing them with an abstract instruction. The paragraph excepted to reads as follows: "***where a collision occurs at a railroad crossing

under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching train or engine and could have plainly seen it, if he had looked, or could have heard its signal if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause [217] of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees.”

The Court: I would like to hear your theory very briefly on the liability under this bond, that is, the amount, or limit of the liability.

(Remarks of counsel not transcribed)

The Court: I will overrule the objections and let the instructions stand as given and you will have your exceptions in the record.

[Endorsed]: Filed January 17, 1944. [218]

[Title of District Court and Cause]

DEFENDANTS' REQUESTED
INSTRUCTIONS

Filed October 19, 1943

Come now the defendants and request the court to give to the jury, in his charge, the following instructions:

Give defendants' requested instruction No. 1; in

the event of the failure to give defendants' requested instruction No. 1, then said defendants, saving an exception to the ruling of the court, requests the court to give its instructions Nos. 2 to 9, herewith submitted.

GEO. H. SMITH

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Defendants

1.

You are instructed in this suit that the defendants were required to and did give a bond to secure the payment of such damages as might accrue as a result of killing or injuring members of the Shoshone and Bannock Indians on the Fort Hall Reservation. You are further instructed that damages do not accrue for the killing or injuring of a person without negligence or other fault, and since no negligence on the part of either of the defendant railroad companies is established there is no liability on the bond, and you are directed to render a verdict against the plaintiff and in favor of the defendants.

2.

You are instructed that the statute upon which this suit is based provides with respect to persons who have been killed that any monies recovered in such suits shall be placed into the Treasury of the United States to the credit of the particular Indian or Indians entitled to the same, and be paid to him or them, or otherwise expended for [219]

his or their benefit, under the direction of the Secretary of the Interior. From this it follows, and you are so instructed, that there can be no award to or recovery of damages by the Tribe in this suit, but whatever award, if any, shall be made must be limited to damages proven to have been sustained by individual members of the Tribe within the rules of law stated elsewhere in these instructions.

3.

The right to recover damages because of the death of Ninip Toane and Helen Toane is limited to the reasonable expectation of pecuniary benefits to particular individuals that may be proven in this case. If you find that no individual was deprived of a reasonable expectation of pecuniary benefits on account of the death of Ninip Toane or Helen Toane you will not award any damages to anyone on account of the death of either of them. There can be no recovery by or on behalf of anyone for the death of Ninip Toane or Helen Toane on account of grief or mental anguish or loss of the society or companionship of either of said persons. Mere blood relationship does not afford any basis for the award of damages. Elements of damage within the realm of possibility but not fairly shown to be reasonably probable do not form the basis for an award of damages. 227 U.S. 145, 227 U.S. 59, 292 U.S. 246.

4.

The court charges you that there can be no recovery in this suit for damages to or destruction of the automobile.

5.

You are not at liberty to award any damages on account of funeral expenses.

In the event of the refusal of the Court to give the above instruction, then the defendants save an exception to such refusal, and requests as follows:

In the event that you shall award damages for funeral expenses they must be limited to such expenses as have been paid by the beneficiaries, or for which they are liable, provided the reasonable value thereof is shown, and provided it appears that the amounts charged are reasonable.

6.

The court calls your attention to the fact that the plaintiff has seen fit to, in a sense, repeat its asserted right of action by restatement of substantially the same thing in several counts. You should not be misled by this into assuming, if you should find in favor of the plaintiff, that you should restate or repeat or multiply any item of damages. All that the plaintiff is entitled to by way of a verdict, in the event that you shall award any sum to the plaintiff, is, first, a single assessment or item of damages on account of the death of Ninip Toane and Helen Toane, and second, a single assessment or item of damages on account of injuries, if any, to Frank Pooewe.

No. 7

You are instructed that the law of Idaho requires travelers upon the highway and about to cross a

railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the tracks. It is also the duty of the traveler to give way for the passage of trains and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears.

No. 8

You are instructed that before the plaintiff can recover in this case it must be established by the evidence that the act of the defendants in operating said train at the time and place of the accident was the proximate cause of the accident and the ensuing injuries to, and the death of, the occupants of the said vehicle, but if you find from the evidence that the proximate cause of said accident was not that of the defendants but was the failure of the occupants of the vehicle to perform their duties, as I have heretofore instructed you, as they approached and attempted to pass over this crossing, then your verdict must be in favor of the defendants. [221]

No. 9

By "proximate cause" is meant the cause from which the injury or death complained of is the ordinary and natural result, and is usual and might have been reasonably expected to occur from such cause. In order to warrant a finding that an act is the proximate cause of injury or death, it should appear that the injury or death was the natural

and probable consequence of the act complained of.

Where a collision occurs at a railroad crossing under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching engine or train and could have plainly seen it, if he had looked, or could have heard its signals if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees. [222]

[Title of District Court and Cause]

ORDER AS TO ORIGINAL EXHIBITS

The defendants in the above entitled cause having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein, and it appearing to the Court that Exhibits 1, 1a and 3 to 8, inclusive, consisting of various receipts and photographs, should be inspected by the appellate court and sent to the appellate to court in lieu of copies thereof.

It Is Hereby Ordered that the original Exhibits 1, 1a and 3 to 8, inclusive, be sent to the appellate court in lieu of copies thereof, or in lieu of being copied in the transcript of the record on appeal, to be such court held for inspection and used on

the appeal taken by the appellants, and it is further ordered that upon completion of the use thereof by the appellate court that the same be returned to this court.

Dated, this 3d day of January, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed January 3, 1944. [223]

[Title of District Court and Cause.]

MINUTES OF THE COURT

March 22, 1943

On motion of the plaintiff, the trial of this cause was continued for the term.

[Title of District Court and Cause]

MINUTES OF THE COURT

October 11, 1943

Hearing on the plaintiff's Motion to Strike from the Answer came on before the Court. E. H. Casterlin, Assistant District Attorney, appeared for the plaintiff, and H. B. Thompson, Esquire, for the defendant.

After hearing argument of respective counsel, the Court took the Motion under advisement.

[Title of District Court and Cause]

MINUTES OF THE COURT

October 18, 1943

Counsel for the respective parties being present, the Court at this time announced his conclusions on defendants' Motion to require the plaintiff to elect upon which counts of the Complaint the plaintiff will proceed in trial. Said Motion was sustained. The plaintiff thereupon elected to proceed on Counts I, II, III, and IV of the Complaint. The Motion directed to paragraph XIII of the 5th, 6th, and 7th Counts of the Complaint were sustained by the Court. The plaintiff's Motion to Strike the defendants' 2nd and 4th defenses was granted, and the Motion to Strike defendants' first defense was denied.

This cause came on for trial before the Court and a jury, E. H. Casterlin, Assistant District Attorney, appearing for the United States and Messrs. H. B. Thompson and L. H. Anderson appearing as counsel for the defendants.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at [224] a time, written on separate slips of paper, to secure a jury. George Ball, J. C. Hardin, and Mrs. Lewis Hammond, whose names were so drawn, were excused for cause; George T. Cox and Mrs. R. R. Beers, whose names were also drawn, were excused on the plaintiff's peremptory challenge; and O. M. Hess, whose

name was also drawn, was excused on the defendants' peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to wit:

Lloyd B. Robinett	Bert Dimick
Mrs. Grace Keppner	Mrs. Reta Austin
Don S. Kent	Merle Miller
Joseph N. Arbon	Talmadge Mickelsen
Able Kunz	D. H. Manwaring
Mrs. W. A. Moss	H. P. Sorensen

A statement of the plaintiff's case was made by the District Attorney, and a statement of the defendants' case was made by the defendants' counsel.

Willie Edmo was sworn as an Indian-English interpreter, and so appeared for the purpose of examination of Indian witnesses.

Whereupon, Leon M. Henry, Adelia Toomuzzo Weiser, Mrs. Pokibro, Helen Young, Dr. W. L. Olsen, and Frank Poewe were sworn and examined as witnesses on the part of the plaintiff. Lamar Pokibro was sworn and an offer of proof was made by the plaintiff.

After admonishing the jury, the Court excused them to 10 o'clock A. M., on October 19, 1943, and continued the trial to that time. [225]

[Title of District Court and Cause.]

MINUTES OF THE COURT

October 19, 1943

This cause came on for further trial before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Bill Edmo, Jacob Browning, Tom Tyboats, and Toane were sworn and examined as witnesses and other evidence was introduced on the part of the United States, and here the plaintiff rests.

Lewis B. Griffin, M. L. Dicks, Mrs. Una Jones, and Winn McCurdy were sworn and examined as witnesses on the part of the defendants, and here the defendants rest.

On rebuttal, Frank Poewe was recalled and further examined as a witness on the part of the plaintiff, and here both sides close.

The plaintiff's counsel moved the Court to strike the fourth defense on all causes of action, which Motion was denied by the Court.

The defendants' counsel moved the Court to direct the jury to return a verdict in favor of the defendants, which Motion the Court denied.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury, and placed them in charge of a bailiff duly sworn, and they retired to consider of their verdict. While the jury was still out, the Marshal was directed to provide them with dinner at the expense of the United States.

Exceptions were taken to certain instructions by both the plaintiff and defendants.

On the same day the jury returned into Court, counsel for respective parties being present, whereupon the jury presented their written verdict, which is in the words following: [226]

“In The United States District Court For The
District of Idaho Eastern Division

VERDICT

We, the jury in the above entitled cause, find for the plaintiff, and fix damages for the death of Ninip Toane in the sum of \$1250.00; and fix damages for the death of Helen Toane in the sum of \$1250.00; and fix damages for the maiming and injury to Frank Poewe in the sum of \$2000.00.

D. H. MANWARING,
Foreman”

The verdict was recorded in the presence of the jury, and then read to them, and they each confirmed the same.

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 3, 1943

The defendants' motion to set aside the verdict and judgment entered herein and for judgment in

favor of the defendants notwithstanding the verdict in accord with the defendants' motion for a directed verdict in favor of the defendants, and, in the event of the failure of the Court to grant said motion, for an order setting aside the verdict and judgment entered herein and granting a new trial pursuant to Rule 50 of the Rules of Federal Procedure, and the rules of this court, came on for hearing before the Court, H. B. Thompson, Esquire, appearing as counsel for the defendants and E. H. Casterlin, Assistant District Attorney, appearing for the United States.

The motions were taken under advisement by the Court. [227]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Come now the defendants-appellants above named, and make the following statement of the points upon which they intend to rely in the appeal taken to the United States Circuit Court of Appeals of the Ninth Circuit in the above entitled cause:

I.

That the evidence is insufficient to justify the verdict and judgment for the death of Ninip Toane and Helen Toane, and injuries to Frank Poewe, or either of them, in that the evidence establishes that the sole proximate cause of the collision and the consequences thereof was the act of the driver of the automobile in attempting to cross the track

immediately in front of the approaching train which could have been seen if he had looked and could have been heard if he had listened.

II.

That the evidence is insufficient to support a verdict or judgment for \$1,250.00, or any other substantial amount, on account of the death of Ninip Toane.

III.

That the evidence is insufficient to support a verdict or judgment for \$1,250.00, or any other substantial amount, on account of the death of Helen Toane. [228]

IV.

That the evidence is insufficient to sustain any damage for funeral expenses.

V.

That the evidence is insufficient to support a finding that any of the Indians described in the complaint were killed or injured in consequence of the fault or negligence of any of the defendants, or their agents or servants.

VI.

That the damages assessed by the jury account of the death of Ninip Toane and Helen Toane are excessive and appear to have been given under the influence of passion and prejudice.

VII.

The Court erred in overruling the defendants' objection to the admission of evidence of funeral expenses.

VIII.

The Court erred in denying defendants' motion for directed verdict in favor of the defendants.

IX.

The Court erred in refusing and denying defendants' requested instructions numbers 1, 7, 8 and 9.

X.

The Court erred in charging and instructing the jury that the defendants were bound to compensate or indemnify the plaintiff, or those on whose behalf the suit was brought, for loss or injury resulting from inevitable or unavoidable causes. [229]

XI.

The Court erred in striking from defendants' answer the third defense set up therein as to each of the First, Second, Third and Fourth counts set forth in the complaint.

XII.

The Court erred in denying defendants' petition for judgment notwithstanding the verdict and alternatively for new trial.

Dated this 3rd day of January, 1944.

H. B. THOMPSON,

Attorney for Defendants-Appellants Residing at: Salt Lake City, Utah.

L. H. ANDERSON,

Attorney for Defendants-Appellants Residing at: Pocatello, Idaho.

Service of the foregoing Statement of Points by receipt of a copy thereof is hereby admitted this 3rd day of January, 1944.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff -
Appellee

[Endorsed]: Filed January 3, 1944. [230]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL.

Come now the defendants-appellants, Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, and hereby designate the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

The complete record and all the proceedings and evidence in the action, including—

1. Complaint
2. Motion for more definite statement and Motion for Bill of Particulars.
3. Bill of Particulars, etc.
4. Answer

5. Plaintiff's Motion to strike certain defenses from answer
6. Defendants' Motion to strike certain portions of the complaint
7. Defendants' Motion to Elect
8. Verdict of the Jury
9. Judgment, with directions for entry thereof
10. Petition on Motion for Judgment Notwithstanding the Verdict and Alternatively for New Trial [231]
11. Order Denying Motion for Judgment Notwithstanding the Verdict and Alternatively for New Trial
12. Notice of Appeal
13. Petition for approval of supersedeas and stay on appeal
14. Order approving bond and granting stay of execution
15. Supersedeas Bond
16. Cost Bond on Appeal
17. All testimony taken at the trial, the same being contained in the Reporter's Transcript, together with instructions given by the Court to the Jury, defendants' requested instructions and exceptions taken to instructions given by the Court and exceptions to instructions requested but not given by the Court.
18. All exhibits offered or introduced in evidence
19. Order of Court transmitting original Exhibits 1, 1a and 3 to 8, inclusive
20. All Court Minutes

21. Statement of points upon which defendants rely on appeal
22. This Designation of Contents of Record, Proceedings and Evidence on Appeal, and Proof of Service.

Dated this 3d day of January, 1944.

H. B. THOMPSON

Attorney for Defendants-Appellants Residing at Salt Lake City, Utah

L. H. ANDERSON

Attorney for Defendants-Appellants Residing at Pocatello, Idaho

Service of the foregoing Designation of Contents of Record on Appeal by receipt of a copy thereof is hereby admitted this 3rd day of January, 1944.

JOHN A. CARVER

E. H. CASTERLIN

Attorneys for Plaintiff-Appellee

[Endorsed]: Filed January 3, 1944. [232]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 232 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellants, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$34.40, and that the same have been paid in full by the appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 29th day of January, 1944.

[Seal]

W. D. McREYNOLDS,
Clerk.

[Endorsed]: No. 10675. United States Circuit Court of Appeals for the Ninth Circuit. Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation and Union Pacific Railroad Company, a corporation, Appellants. vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho Eastern Division.

Filed February 2, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
For The Ninth Circuit

No. 10675

THE OREGON SHORT LINE RAILROAD COM-
PANY, a corporation, SAINT PAUL-MER-
CURY INDEMNITY COMPANY OF ST.
PAUL, a corporation, and UNION PACIFIC
RAILROAD COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

STIPULATION DISPENSING WITH
PRINTING EXHIBITS

It is Hereby Stipulated between the parties here-

to through their respective counsel that Exhibits 1, 1a, and 3 to 8 inclusive, which were received in evidence at the trial in the above entitled cause, be considered by this court in their original form without being printed or reproduced for the reason that said exhibits are not of a printable type, because exhibits 3 to 8 inclusive are photographs of the railroad crossing where the accident occurred and the surrounding physical conditions, exhibit 1 consists of numerous bills and receipts attached, together with adding machine computations thereof, and exhibit 1a being the envelope in which said receipts and data are contained.

H. B. THOMPSON,

L. H. ANDERSON,

Attorneys for Appellants

JOHN A. CARVER

U. S. Attorney

Attorney for Appellee

So Ordered:

CURTIS D. WILBUR

Senior United States Circuit
Judge

[Endorsed]: Filed Feb. 3, 1944. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ADOPTION OF STATEMENT OF POINTS
FILED IN THE DISTRICT COURT AND
DESIGNATION OF RECORD

Comes now the appellants Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, by their attorneys herein, and hereby adopt the statement of points upon which they intend to rely in the appeal of the above case which was filed with the Clerk of the District Court on the 3rd day of January, 1944.

The appellants deem the entire record as filed to be necessary for the consideration of the contentions contained in said statement of points filed with the Clerk of the District Court.

Dated this 1st day of February, 1944.

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Appellants

[Endorsed]: Filed Feb. 3 1944. Paul P. O'Brien, Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a
corporation, SAINT PAUL-MERCURY INDEMNITY
COMPANY OF ST. PAUL, a corporation, and UNION
PACIFIC RAILROAD COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

Appeal from the District Court of the United States for the
District of Idaho, Eastern Division

H. B. THOMPSON
Salt Lake City, Utah

L. H. ANDERSON
Pocatello, Idaho
Attorneys for Appellants

FILED
MAR 18 1914

PAUL B. STANLEY,
Clerk

No. 10675

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a
corporation, SAINT PAUL-MERCURY INDEMNITY
COMPANY OF ST. PAUL, a corporation, and UNION
PACIFIC RAILROAD COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

Appeal from the District Court of the United States for the
District of Idaho, Eastern Division

H. B. THOMPSON
Salt Lake City, Utah

L. H. ANDERSON
Pocatello, Idaho
Attorneys for Appellants

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No. 10675

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a corporation, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

JURISDICTION

This suit was instituted by the United States of America on behalf of the Shoshone and Bannock tribes of Indians under authority of Act of September 1, 1888, c. 936, 25 Stat. 452, and jurisdiction of the District Court was invoked under section 14 of that Act, which requires the railway company to execute a bond to the United States in the penal sum of \$10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to the tribes, or of their livestock, or by reason of fires originating in the

operation of said railway. Said statute was passed in connection with a treaty made and concluded between the U. S. A. and said tribes of Indians on the 3rd day of July, 1868, (15 Stat. L. 673). A copy of the statute is set forth at pp. 49-54 *infra*, Appendix "1".

The case came on for trial before Honorable Chase A. Clark and a jury on the 18th day of October, 1943, and on the 19th day of October the jury returned a verdict in favor of the plaintiff and against the defendants as follows: \$1,250.00 damages for the death of Ninip Toane; the sum of \$1,250.00 damages for the death of Helen Toane, and the sum of \$2,000.00 damages for personal injuries sustained by Frank Pooewe (R. 76, 219), upon which judgment was accordingly entered on the 20th day of October, 1943, (R. 77-78), following which defendants served and filed their Petition on Motion for Judgment Notwithstanding the Verdict, and Alternatively for a New Trial (R. 78-82), which was by the court denied on November 18, 1943 (R. 83). Notice of Appeal was filed January 3, 1944 (R. 83-84). The jurisdiction of this court is invoked under Section 128 of the Judicial Code, as amended, 28 USCA Sec. 225 (a).

STATEMENT OF THE CASE

This action arose out of a collision between a train operated by the Union Pacific Railroad Company, traveling south through the Fort Hall Indian Reservation, and a 1934 Chevrolet truck occupied by Frank Pooewe, Ninip Toane and Helen Toane and driven by Frank Pooewe. The accident occurred between 5 and 6 P. M. October 29, 1941, as said truck loaded with long poles attempted to cross the tracks from east to west at a point about one mile south of Fort Hall, Idaho, resulting in injuries to Frank Pooewe and the death of Ninip Toane and Helen Toane, all members of the Shoshone-Bannock tribes of Indians, and all of whom lived on the said Fort Hall Indian Reservation (R. 137-138, 153-155, 171-174, 177-179).

The complaint consists of seven counts; the first count is for damages in the sum of \$10,000.00 for the death of Ninip and Helen Toane and personal injuries to Frank Pooewe, under the statute of September 1, 1888 (25 Stat. L. 452) (R. 2-12) and the bond given by the Oregon Short Line Railroad Company dated July 30, 1935, and given pursuant to said statute (R. 8-9); the second count, upon the same statute and bond for the death of Ninip Toane (R. 12-14); the third count upon the same statute and bond for the death of Helen Toane (R. 14-16); the fourth count upon the same statute and bond for personal injuries sustained by Frank Pooewe (R. 16-18). The remaining three counts were stricken when the appellee elected to proceed upon Counts 1, 2, 3, and 4 only (R. 95-96). Briefly stated, the complaint, as to each count, merely alleges the making of the treaty, a

report of the Committee on Indian Affairs, the Act of Congress, the giving of the bond, and the occurrence of a railroad crossing collision in which two Indians were killed and one injured. (R. 2-18). No negligence was charged and none proven. Appellant answered admitting the report made to Congress on June 5, 1888 by the Committee on Indian Affairs, copy of which is attached to the complaint marked Exhibit A; admitted that an agreement was made on May 27, 1887 between the United States of America and the Shoshone and Bannock tribes of Indians, which was ratified and embraced within an Act of Congress approved September 1, 1888 (25 Stat. L. 452); admitted the execution of the bond set forth in the complaint (R. 57-59); denied that the defendants became liable or obligated under the bond or otherwise to pay any sum on account of the killing or maiming of any Indian occurring without fault or negligence (R. 59-60); admitted the collision, the death of Ninip and Helen Toane and that Frank Pooewe received some injuries (R. 60-61) and generally denied the other allegations in the complaint. Appellant then set up in its third defense that recovery under the statute and bond could not be had without fault or negligence (R. 62, 65, 66, 67), which was stricken by the court (R. 96). Appellants' Fourth Defense set up that the collision and ensuing injuries and deaths were caused solely by the acts and omissions of duty on the part of the occupants of the truck in driving upon the track immediately in front of the approaching train which could have been seen or heard in time to have avoided the collision if the occupants had looked or listened, and accordingly the acts and omissions of the occupants of the truck were the sole proximate cause (R. 63-64).

The court denied appellee's motion to strike this defense (R. 96-97). Similar answer was made to the remaining counts set forth in the complaint.

QUESTIONS PRESENTED

1. Whether under the Act of September 1, 1888 (25 Stat. 452) and the bond given thereunder the railroad company and the surety are liable for injuries to or the death of the Indians involved herein within the limits of the Fort Hall Indian Reservation in consequence of having been struck by a railroad train but without negligence on the part of the railroad company. This question is raised in appellants' Third Defense to each Count (R. 62), and which defense was by the court stricken (R. 96); exception to the court's instructions (R. 205-206) refusal to give appellants' requested instruction No. 1 (R. 206-207) and by petition on motion for judgment notwithstanding the verdict and alternatively for a new trial (R. 81).
2. Whether the verdict of the jury and the judgment entered therein can stand in view of the fact that the evidence establishes the proximate cause of the collision and resulting injuries and death of the occupants of the truck, to be the acts and/or omissions of the driver of the truck and the other occupants in going upon the track immediately in front of the approaching train without looking or listening, or both, for said train, when if they had looked or listened, they could have either seen or heard the

train in sufficient time to have stopped the truck before getting on the track. This question is raised by appellants' motion for a directed verdict (R. 189-190), appellants' petition on motion for judgment notwithstanding the verdict and alternatively for a new trial, para. 1 a (R. 78-79), and the court's refusal to give appellants' requested Instructions No. 7 (R. 208- 212-213) and 9 R. 208-209, 213-214).

3. Whether the verdict of the jury and the judgment entered thereon can stand with reference to the death of Ninip Toane and Helen Toane in view of the fact that no beneficiary sustained any pecuniary loss as the result of the death of Ninip Toane, and the pecuniary loss, if any, to any, or all beneficiaries of Helen Toane did not exceed \$250.00. The question is raised by paragraphs I (b) and I (c) of appellants' petition on motion for judgment notwithstanding the verdict, and alternatively for a new trial (R. 79-81). See the court's instruction (R. 199-200).
4. Whether the evidence is sufficient to sustain any damages for funeral expenses and whether the court erred in overruling appellants' objection to the admission of evidence relating thereto. This question is raised by appellants' objection to the introduction of such evidence (R. 110-111, 112), and by its petition on motion for judgment notwithstanding the verdict and alternatively for a new trial. Para. I (d) and III (a) (R. 81).

STATEMENT OF FACTS

As already stated, the accident involved herein occurred between 5 and 6 o'clock P. M. on the 29th day of October, 1941, when a 1934 Chevrolet truck occupied by Ninip Toane, Helen Toane and Frank Pooewe was struck by a southbound railroad train as it attempted to cross the tracks at a point about one mile south of Fort Hall, on the Fort Hall Indian Reservation (R. 153-155, 171-174, 177-179).

The truck was being driven by Frank Pooewe. He and Ninip and Helen Toane had been to the mountains east of Fort Hall and were returning with a load of poles (R. 137-138). There were about eighty poles on the truck which measured about ten inches through at the butt end (R. 153) and the poles were as long as from the witness chair to the south door of the court room (R. 153), which distance measured 36 feet 6 inches (R. 186). The truck before reaching the crossing, traveled south parallel with the railroad track, and as it approached the crossing the driver testified he slowed down, shifted the gears and was traveling about 5 miles per hour as he made the right hand turn to cross over the track. When he made the turn to the right to cross, he was about 27 or 30 feet from the tracks (R. 154-155, 186). As the truck reached the first rail of the track Mrs. Toane said "here comes a train" (R. 155), and then the automobile stalled (R. 188).

The freight train was southbound and consisted of about 65 or 66 cars (R. 172) and was traveling about 40 miles per hour as it approached the crossing (R. 179). The electric headlight of the engine was burning brightly (R. 178), and

the whistle was being sounded and the engine bell was ringing. The head brakeman sitting on the left or east side of the engine saw the auto on the highway when the engine was about 200 yards north of the crossing (R. 172), blowing the whistle and moving at a speed of about 37 to 42 miles per hour (R. 173-174). As the auto was driven upon the track the engineer immediately applied the brakes of the train in emergency and did everything that could be done to stop or reduce the speed of the train to avoid a collision (R. 174-179). The accident could not have been avoided by the engineer (R. 181). The view of the approaching train was unobstructed (R. 174).

The collision resulted in the death of Ninip Toane and Helen Toane and personal injuries to Frank Pooewe (R. 139-140). All of the occupants belonged to the Bannock-Shoshone tribe (R. 98-99). Ninip and Helen Toane each had certain allotments consisting of approximately 173 acres of land (99, 101-102). Frank Pooewe had no land allotted to him (R. 102).

Helen Toane left surviving her, her mother Adelia Too-tath Weiser, who was a grown woman at the time of the Nez Perce War (1877) (R. 106, 120), and if she was 20 years old then she would be about 84 years old at the time of Helen's death, with a life expectancy of about two years. A son Irving Toane born in 1915 and married was also a survivor (R. 113). Helen Toane also had one half brother and two half sisters (R. 121). Ninip Toane was survived by his son Irving Toane, and by his father, known only as

"Toane," a very old Indian who lives with his daughter at Fort Washakie, Wyoming (R. 170).

The only contribution made by Helen Toane during her lifetime was to her mother and it consisted of money, not to exceed \$100.00, and about \$20.00 worth of groceries at various times. Ninip Toane contributed nothing (R. 121-122). Both before and after Helen's death her mother sewed buckskin and was receiving a pension through the Indian Agency and she gets along fairly well on the pension (R. 124), she has a husband who farms (R. 124) and they both have land, but no cattle (R. 123).

Ninip Toane contributed to no one. His father was asked if Ninip contributed to his support during his son's lifetime, and his reply was "He contributed very little." He couldn't remember when he had last lived with his son, but it was "quite a while back" (R. 121, 170).

The funeral lasted four days, during which time considerable food was consumed by about 200 people attending the funeral (R. 109-110). The cost, excluding the beef, amounted to about \$100.00 (R. 111), and the two beef cattle cost about \$90.00 each (R. 163). The bills for food were paid from Ninip Toane's account at the Fort Hall Agency, and amounted to \$63.28 (R. 113).

Irving Toane, the son of Ninip and Helen Toane, inherited all of the property of Ninip Toane and Helen Toane, and "anything she owned went to Ninip Toane and Adelia Weiser, and all of Ninip Toane's went to Irving Toane as the sole heir" (R. 115).

SPECIFICATION OF ERRORS

I.

The evidence is insufficient to support the verdict and the judgment entered thereon for the death of Ninip Toane and Helen Toane, and for injuries sustained by Frank Pooewe, or either of them, for the reason that the evidence will sustain no other finding and conclusion than that the sole proximate cause of the collision and the ensuing deaths and injuries was the act of the driver of the truck in attempting to cross the track with a large load of long poles in the immediate presence of a rapidly approaching train which could have been seen or heard by said driver and the occupants thereof, if either of them had looked or listened for said train which they were bound to do and give precedence to the train. (See paragraph I (a) of appellants' Petition on Motion for Judgment Notwithstanding the Verdict, and, Alternatively, for a New Trial. (R. 78).

II.

The evidence is wholly insufficient to support a verdict or judgment for \$1,250.00, or in any amount on account of the death of Ninip Toane for the reason that there is no substantial or other evidence that any Indian or any other person sustained any damages or pecuniary loss on account of the death of Ninip Toane.

III.

The evidence is wholly insufficient to support a verdict or judgment for \$1,250.00 or any other substantial amount on account of the death of Helen Toane for the reason that

the only evidence of pecuniary loss suffered by anyone was by her mother, Adelia Weiser, who, during the lifetime of her daughter Helen, received only about \$100.00 in money in addition to a few groceries purchased at various times amounting to about \$20.00 each.

IV.

The evidence is insufficient to sustain any damages for funeral expenses, because such expenditures were a proper charge of the estate of said deceased Indians, and no damages accrued to anyone on account thereof; and there was no authority in law for permitting recovery therefor.

V.

The evidence is insufficient to support a finding that any of the Indians described in the complaint and referred to in the evidence were killed or injured in consequence of the fault or negligence of any of the defendants, or their agents or servants, and accordingly no damages accrued to anyone against any of the defendants in consequence of the collision described in the complaint.

VI.

The court erred in overruling appellants' objection to the admission of the following evidence concerning funeral expenses:

1. The reasonable cost or expense of fruits, vegetables and other things, not including beef, amounting to \$100.00 (R. 111) to which evidence objection was made that it was "incompetent, irrelevant and immaterial under any circumstances because if there were expenditures made

this is not the proper way to prove them. To establish what is the usual expenditure is not the measure of damages, or a proper measure of damages, but the measure is what is the proper expenditure here.” (R. 110-111). The witness answered that about \$100.00 would be a reasonable value for the food, including beef. (R. 111).

2. To the admission in evidence of appellee’s Exhibits 1 and 1 a, covering money paid by the agency from the account, or out of the funds of the estate of Ninip Toane for food consumed, exclusive of beef, for the funeral, in the amount of \$63.28 (R. 113) to which objection was made “first ‘I assume that our general objection is overruled, and I object for the further reason that according to the bill of particulars some of this was furnished by one, and some another and it is my belief that these items rest on different basis. I should be given an opportunity to object to the various expenditures by the various persons. “* * * Object to that as the record would be the best evidence. No proper foundation is laid.” (R. 112).
3. There were two beef killed for the funeral and the court permitted the witness to give testimony as to the value of the one owned by Ninip Toane, to-wit \$90.00 (R. 162-163), to which objection was made that the evidence was “incompetent, irrelevant and immaterial because the funeral expenses paid out of the estate are not chargeable in a suit of this kind,” following which the witness answered that the two beeves were worth \$90.00 each (R. 162-163).

The court erred in denying the appellants' motion for a directed verdict in favor of all of the appellants for the reasons stated in said motion and for the reasons set forth in Specification of Error I.

VIII.

The court erred in instructing the jury that the Act of Congress of September 1, 1888, 25 Stat. 452, "contemplates and requires the payment of damages independent of negligence, also requires the payment of damages if the loss was occasioned by an inevitable and unavoidable accident" (R. 198), for the reason and "upon the ground that it is not within the theory, language or spirit of the bond or the statute that the Railroad Company or the Surety should be required to pay damages for loss occasioned by inevitable accident or an unavoidable accident" (R. 205).

IX.

The court erred in instructing the jury as follows: "The jury is instructed that in their popular sense, the words used in the Act of Congress of September 1, 1888, 25 Stats. 452 reasonably imported the broad purpose of saving the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Reservation harmless, and of insuring them against loss occasioned by inevitable accident" (R. 198) for the reason and "upon the ground that neither the language of the statute or the bond given pursuant thereto import either in language or in law an obligation tantamount to or constituting insurance against loss, and does not insure against loss occasioned

by an inevitable accident and such is not the literal or legal purpose or intent of the language or spirit of either the statute or the bond." (R. 205-206).

X.

The court erred in instructing the jury as follows:

"The jury is instructed that by the Act of Congress of September 1, 1888, 25 Stats. 452, the railroad company indemnifies the Shoshone and Bannock tribes of Indians of the Fort Hall Reservation against any and all damages which may accrue to said tribes or either of them, or of their livestock, in the construction or operation of said railroad or by reason of fires originating thereby; and is an insurer in respect to such damages." (R. 198-199) for the reason and "upon the ground that neither the language of the statute or the bond given pursuant thereto import either in language or in law an obligation tantamount to or constituting insurance against loss, and does not insure against loss occasioned by an inevitable accident and such is not the literal or legal purpose or intent of the language or spirit of either the statute or the bond." (R. 206).

XI.

The court erred in refusing to give to the jury appellants' written requested instruction No. 1, reading as follows: "You are instructed in this suit that the defendants were required to and did give a bond to secure the payment of such damages as might accrue as a result of killing or injuring members of the Shoshone and Bannock Indians on the Fort Hall Reservation.

You are further instructed that damages do not accrue for the killing or injuring of a person without negligence or fault, and since no negligence on the part of either of the defendant railroad companies is established there is no liability on the bond, and you are directed to render a verdict against the plaintiff and in favor of the defendants." (R. 210) for the reason and "upon the ground that the statute provides only for the giving of a bond for the recovery of damages which may accrue to the Indians; and that damages do not accrue without wrong on the part of the party complained of, nor under the language or purpose of the statute and the bond except by fault or negligence or invasion of the (a) legal right by the party charged." (R. 206-207).

XII.

The court erred in refusing to give to the jury appellants' written requested instruction No. 7, reading as follows: "You are instructed that the law of Idaho requires travelers upon the highway and about to cross a railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the track. It is also the duty of the traveler to give way for the passage of trains and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears." (R. 212-213) for the reason and "upon the ground that the failure of the driver of the automobile and the other occupants to observe this law which was binding upon them was the proximate cause of their injuries, or if not the proximate cause of their

injuries, as a matter of law, was a proper subject for the consideration of the jury." (R. 208).

XIII.

The court erred in refusing to give to the jury the second paragraph of appellants' written requested instruction No. 9, reading as follows: "Where a collision occurs at a railroad crossing under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching train or engine and could have plainly seen it, if he had looked, or could have heard its signal if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees." (R. 213-214). The first paragraph of said instruction was given by the court and reads as follows: "You are told that the proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred." (R. 198), concerning which no complaint is made, but appellant excepted to the court's failure to give the second paragraph for the reason that said second paragraph "applies the definition to hypothetical facts or assumed facts in such a way as to enable the jury to make an application of the principle of law involved, in place of merely furnishing them with an abstract instruction." (R. 208).

XIV.

The court erred in striking from appellants' answer the third defense set up therein as to each of the First, Second, Third and Fourth Counts set forth in the complaint (R. 62, 65, 66, 67, 96) for the reason that it is not within the theory, language or spirit of the bond or the statute that the Railroad Company or Surety should be required to pay damages for loss occasioned by an inevitable accident or an unavoidable accident, and in the absence of negligence on the part of the railroad company, its agents, servants or employees in the operation of the train.

XV.

The court erred in denying appellants' Petition for Judgment Notwithstanding the Verdict, and Alternatively, for a New Trial, for the reasons set forth therein and for the reasons set forth in the foregoing specifications of error. (R. 78-83).

ARGUMENT

As heretofore stated, this action arises out of a collision between a railroad train and a truck on October 29, 1941, at a point about one mile south of Fort Hall on the Fort Hall Indian Reservation, resulting in injuries to one Indian and the death of two others. The action is based upon the same statute as that involved in *U. S. vs. Oregon Short Line R. Co.*, (9th Cir.) 113 Fed. (2d) 212. That case, however, only involved the question of whether the United States must in such an action plead and prove negligence before a recovery could be had under the statute, and this court ruled that an averment of negligence on the part of the Railroad Company was not necessary. The case at Bar presents again that question for review, and also several others.

A portion of the Act of Congress (25 Stat. L. 452), which ratified the agreement made between the United States and the Bannock and Shoshone tribes of Indians on the 27th day of May, 1887, and granted to the Utah and Northern Railway Company a right of way through the Fort Hall Reservation is set forth in Appendix 1. The Act granted a right of way 200 feet wide to the Utah and Northern Railway Company and required that Company to pay the Indians \$8.00 per acre therefor. Section 14 of the Act reads as follows:

“That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannock tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of

any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to affect an amicable settlement with the parties in interest to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States; Provided, That all moneys so recovered by the United States Attorney under the provisions of this section, shall be covered into the Treasury of the United States, to be placed to the credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior." (R. 6 and Appendix 1.)

Consistently with the provisions thereof and on the 30th day of July, 1935, the Oregon Short Line Railroad Company, successor to the Utah and Northern Railway Company, executed a bond, which is also set forth in the complaint (R. 8-9) .

I.

THE PROXIMATE CAUSE OF THE COLLISION WAS NEITHER THE PRESENCE OF THE RAILROAD TRACK NOR THE OPERATION OF THE TRAIN, BUT THE ACT OF POOEWE IN DRIVING THE TRUCK ONTO THE TRACK IMMEDIATELY IN FRONT OF THE APPROACHING TRAIN, WHICH WAS IN PLAIN VIEW, AND WHICH HE AND THE OTHER OCCUPANTS OF THE VEHICLE WERE UNDER THE DUTY OF LOOKING FOR AND CHARGED WITH HAVING SEEN
(Errors I, VII, VIII, IX, X, XII, XIII)

For the foregoing reasons the court, after having refused to strike the defendants' fourth defense (R. 63, 96-97), erred in denying the defendants' requested instruction No. 7, which charged the Indians with the same duty of self-preservation as is incumbent upon a white man (error XII), in denying that portion of the defendants' requested instruction No. 9 embraced within assignment of error XIII, in instructing the jury that the defendants were liable for loss occasioned by inevitable and unavoidable accident (error VIII), and that the defendants were insurers (error IX). As appellants' counsel stated in their exception to the refusal to give their requested instruction No. 7, if the court was not prepared to hold as a matter of law that the proximate cause of the collision was the act of the Indians in the particulars above mentioned, it was a proper subject for the consideration of the jury (R. 208) it being the law of the case, under the previous refusal of the court to strike the fourth defense, at

the time the instructions were given, and they should have been correctly instructed with reference thereto, whereas under the charge as given this duty of the court was wholly ignored, and by the other instructions above mentioned the jury was charged in substance and effect that proximate cause was no defense and that the Railroad Company was an insurer against self-destruction.

The facts of the case are that the truck was traveling south on a highway which paralleled the track on the east and was loaded with about 80 poles about 36 feet long and about 10 inches thick at the butt end ((R. 137-138, 153, 186). Before the truck reached the crossing the driver reduced the speed to about five miles per hour and shifted gears; when he made the turn to the right to cross the tracks he was about 30 feet from the tracks, but neither the driver nor the occupants of the truck heeded the approaching train until the truck reached the first rail, when Mrs. Toane said "here comes a train" (R. 154-155, 188), notwithstanding the fact that there were no obstructions to the view of the train as it approached the crossing from the north with its headlights burning brightly, the whistle sounding and the bell ringing (R. 172-174, 178). As soon as the truck reached the track and stopped the engineer when about 200 yards from the crossing (R. 172) and proceeding at a speed of 40 miles per hour (R. 173-174, 179) immediately applied the brakes of the train in emergency and did everything that could be done to stop or reduce the speed of the train to avoid a collision, and everything was done that could have been done by the engineer to avoid a collision (R. 174, 179).

At the close of all of the evidence the appellants moved for a directed verdict (R. 189-190) upon the ground that the sole proximate cause of the accident was the act of the driver of the truck in driving upon the track immediately in front of a train which he could have seen or heard if he or the other occupants of the truck had looked or listened, which they were bound to do, before attempting to cross the track or before reaching a zone of danger. The collision was not the result of an inevitable accident because it was the duty of the driver to stop the truck if necessary and give precedence to the train. It was an inevitable risk that the driver and the occupants took and without any opportunity for the engineer of the train to avoid the collision. Therefore the proximate cause of the collision was not the result of anything the operators of the train did or did not do, but it was the act or omissions to act of the driver and occupants of the truck in failing to observe or heed the train and so regulate the vehicle as to give the train precedence. It was no different than if after the Indians had crossed the track they had immediately driven onto the Yellowstone Highway which parallels the track on the west without stopping at the arterial stop sign and were struck by a southbound automobile.

The duty of a traveler upon a highway, and these Indians were travelers on the highway, is well settled by the decisions of all the courts. The Idaho Supreme Court has laid down the following rule:

“A person approaching a railroad-highway crossing, a danger and itself a warning, is required to exercise reasonable care for his safety, and to look and listen from a place of safety, and if necessary so to do,

stop, and look and listen from a point where his observation is effective, and from ^{where} had he looked he could have seen, or heard had he listened. He may not go onto the crossing without reasonably using his senses, and while in a place of safety must effectively look and listen, and make sufficient careful observation to ascertain whether he may safely proceed before going upon the track, in order to avoid any possible accident from approaching trains, and his failure to do so is not excused by the railroad company omitting its statutory duties. While he need not necessarily keep his eyes continuously upon the railroad track, where there is no obstruction the traveler is bound to see what is plainly visible. Anyone who fails to observe the above caution, or thoughtlessly goes upon a crossing, his mind not then being diverted by anything not under his control, or chargeable to the railroad company, or which should reasonably be guarded against by the railroad company, as a hazard at the crossing, is guilty of contributory negligence, depriving him of the right to recover for any injury occasioned thereby. If he chooses to take risks, he must bear the possible consequences thereof."

Whiffin vs. Union Pacific R. Co., 60 Ida. 141,
89 Pac. (2d) 540, 546.

Contributory negligence, which the court refers to, is under the circumstances of this case only proximate cause, and we perceive no less amount of duty on the part of an Indian who travels upon the highway than any other person. The Act, in our opinion, was never intended to permit a recovery for injuries to Indians who had no one to blame except themselves for an unfortunate accident which may befall them such as the one in the case at Bar.

The court instructed the jury that the Act did "not contemplate and require the payment of damages if the acts of

the parties complainant was the proximate cause of the injury'' (R. 198), following which the court defined proximate cause as follows:

''You are told that the proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred.'' (R. 198).

Therefore, from the facts as heretofore recited and which are undisputed, and applying the definition of proximate cause to them, there is no escape from the proposition that the jury did not follow the court's instructions, undoubtedly because of the other conflicting instructions above mentioned, and it is also our opinion that under the facts and consistent with the court's instructions on proximate cause, the court should have granted appellants' motion for a directed verdict and denied a recovery to the plaintiff. The following cases we believe fully support our position:

St. Louis I. M. & S. R. Co., vs. Commercial Union Insurance Co., 139 U. S. 223, 35 L. Ed. 154;

Memphis Railroad Company vs. Reeves, 77 U. S. (10 Wall) 176, 19 L. Ed. 909;

Atlantic Coast Line R. Co., vs. Driggers, 279 U. S. 787, 73 L. Ed. 957;

Southern Railway Company vs. Walters, 284 U. S. 190;

Southern Railway Company vs. Youngblood, 286 U. S. 313;

Rowe vs. Northern Pacific Railway Company, 52 Idaho 649, 17 Pac. (2d) 352;

Ranstrom vs. Oregon Short Line R. Co., 18 Fed. Supp. 256.

Certainly there could have been no recovery under the statute or the bond herein involved if these Indians had run into the side of the train as the train was passing over the crossing, for their act would have constituted the proximate cause of the collision just as it did in Southern Railway Company vs. Walters, *supra*, or in Rowe vs. Northern Pacific Railway Company, *supra*, where the courts held that a verdict should have been directed in favor of the railroad companies.

The Federal District Court in Ranstrom vs. Oregon Short Line R. Co., *supra*, denied a recovery in a similar case and held that the driver's act of running into the side of the train constituted the proximate cause.

See also:

Davis vs. Kennedy, 266 U. S. 147;

Atlantic Coast Line R. Co., vs. Davis, 279 U. S. 34.

Under the Federal Employers Liability Act contributory negligence is not a defense but results only in the diminution of damages, or in other words amounts to only comparative negligence. Nevertheless the United States Supreme Court has held, as have other courts, that an employee's act may be such as to constitute the sole proximate cause of the injury and therefore operates to deny a recovery as a matter of law. See the annotation in Davis vs. Kennedy, *supra*, 266 U. S. 147.

A very similar and pertinent illustration is an action by an employee against a Railroad Company for violation of the Safety Appliance Act. That act imposes an absolute duty upon the employer by which the employers common law duty is superseded.

Tipton vs. Atchison T. & S. F. R. Co., 298 U. S.
141, 80 L. Ed. 1091.

The ruling of this court in *United States vs. Oregon Short line R. Co.*, supra, 113 Fed. (2d) 212, imposes no greater duty on the Railroad Company than is imposed under the Safety Appliance Act, and under the Safety Appliance Act the United States Supreme Court has said:

“The rule clearly deducible from these four cases is that * * * * an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury;”

Davis vs. Wolfe, 263 U. S. 239, 68 L. Ed. 284,
287.

In the case at Bar the Railroad Company was operating its train in a lawful manner and was not in any respect violating either Section 14 of the Act in question or the bond which was given in connection therewith. The presence of the train was merely a condition, and under the facts established upon the trial the court should have directed a verdict in favor of the defendants, but in the absence of so doing he should have intelligibly instructed the jury on the law of proximate cause, and not have set that defense at naught by

stating that the Railroad Company was an insurer, even against inevitable accident.

II.

THE COURT ERRED IN DENYING APPELLANTS' REQUESTED INSTRUCTION NO. 7 AND THE SECOND PARAGRAPH OF REQUESTED INSTRUCTION NO. 9

(See Specifications of Error XII and XIII)

These two requested instructions are allied with the subject just discussed and relate to proximate cause. As stated above, the court instructed the jury in effect that no damages could be awarded if the acts of the Indians were the proximate cause of the injury, and then defined proximate cause. These were merely abstract instructions and left the jury without anything to guide them in applying the facts to the law as announced in the court's instructions.

Requested Instruction No. 7 read as follows:

"You are instructed that the law of Idaho requires travelers upon the highway and about to cross a railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the track. It is also the duty of the traveler to give way for the passage of trains and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears."

This instruction was appropriate in the consideration of the question of proximate cause because it is a correct state-

ment of the law with respect to the duty of a traveler as announced by the Idaho Supreme Court in *Whiffin vs. Union Pacific Railroad Company*, 60 Idaho 141, 89 Pac. (2d) 540, 546, and which is the law throughout the entire country.

The second paragraph of requested instruction No. 9, and which the court refused to give, read as follows:

“Where a collision occurs at a railroad crossing under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching train or engine and could have plainly seen it, if he had looked, or could have heard its signal if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees.”

The first paragraph of the instruction was given by the court and defined proximate cause as set forth above.

This requested instruction, like requested instruction No. 7, would have enabled the jury to apply the facts to the principle of law given by the court and it was prejudicial for the appellants for the court not to do so.

“Each party has the right to have the jury instructed so clearly and pointedly as to leave no ground for misapprehension or mistake.”

Pickett vs. Gray, McLean & Percy (Ore.) 31 Pac. (2d) 652.

“It is a familiar and well established principle that a party litigant may demand submission of any theory of the case supported by substantial evidence. It does not satisfy this requirement that instructions be correct in the abstract, or that they be broad enough to include the proposition presented by the tendered instruction. It is the party’s right to have an application of the law to *specific facts* on which he relies, if there be evidence of such facts.” (Italics ours.)

Marcus vs. St. Paul Fire & Marine Ins. Co. (N. M.)
1 Pac. (2d) 567, 569.

In Grand Trunk Ry. Co., vs. Cobleigh (2 Cir.) 78 Fed. 784, 787, the court reversed a judgment for the plaintiff, saying:

“In his instructions the trial court judge did not give the jury any definition of contributory negligence beyond the statement that it consisted in the omission to use the care of a prudent man. We think the defendant was entitled to the benefit of a specific instruction defining the rule of contributory negligence applicable to the case of a person about to cross a railway track. In view of the instructions given and those which were refused, the jury were at liberty to adopt their own standard of prudent conduct, and accept one less rigorous than that adopted by the courts. The first of the requests refused presented the general rule which should have been given to the jury for a guide. The second presented a rule specifically applicable to a state of facts which they would have been warranted in finding established by the evidence.”

In Panama R. Co., vs. Davies (5 Cir.) 82 Fed. (2d) 123, the law is stated in the syllabus:

“Abstract principles should not be charged, but charges should be supported by evidence and be appropriate to the case.”

In *Northern Central Coal Company vs. Hughes*, 224 Fed. 57, the Eighth Circuit Court of Appeals, speaking through Judge Sanborn, said:

“The refusal of the court to give the instruction requested, therefore, violated the salutary rule that where the charge of a court states general rules of law governing the case, but fails to set forth the specific issues which the jury is called upon to determine and to apply the law to them, either party upon request is entitled to additional instructions which tersely and clearly state the crucial issues which the jury must determine and the law applicable to those very issues. A charge which presents to a jury specific issues which they are to decide, and applies to them the rules of law, makes the duty of the jury more perceptible, its discharge easier, and is more conducive to the just and speedy administration of justice than the statement of correct abstract legal propositions. *Western Union Telegraph Co., v. Morris*, 105 Fed. 49, 54, 55, 44 C. C. A. 350, 355, 356, and cases there cited; *Frizzell v. Omaha Street Ry. Co.*, 124 Fed. 176, 180, 59 C. C. A. 382, 386; *Cleveland C. C. & St. L. Ry. Co., v. McClintock*, 91 Fed. 223, 227, 33 C. C. A. 466, 470; *Railway Company v. Johnson*, 90 Ga. 500, 16 S. E. 49.

* * * * *

“The instruction requested clearly and correctly stated a crucial issue in the case, the law applicable to it, and the duty of the jury regarding it, and it was fatal error to refuse to give it.”

In *Frizzell vs. Omaha St. Ry. Co.*, 124 Fed. 176, the court said:

“A charge which applies to the facts of the case in hand the rules of law which govern the issues, and clearly states to the jury the crucial questions which they must answer, is much more helpful to them, and conduces far more to a just administration of the law, than abstract propositions of law or dissertations on sound theories, concerning the application of which to the issues they are to decide the jury is left in doubt.”

To the same effect see:

Ralston vs. Plowman, 1 Idaho 595, 597;

Allen vs. St. Louis Transit Co. (Mo.) 81 S. W. 1142, 1146, 1147;

Union R. Co., vs. State (Md.) 19 Atl. 449;

Baltimore & O. R. Co., vs. Beck, (Ohio) 157 N. E. 485.

These instructions also correctly stated the law to the effect that operators in charge of a locomotive had the right to assume that a traveler would perform his duties in that respect until the contrary appeared, as announced in McIntire vs. O. S. L. Railroad Co., 56 Idaho 392, 55 Pac. (2d) 148, 150.

These decisions are in harmony with the decision of our District Court as announced in Ranstrom vs. Oregon Short Line R. Co., 18 Fed. Supp, 256, and the fact that a man is an Indian does not alter the case, for he is endowed with the same senses as any other human being and is not relieved from the legal consequences of his omission of duty in driving an automobile upon a highway or across a railroad track that is incumbent upon a white man. We believe this propo-

sition will not be disputed and that these two requested instructions should have been given for they bear directly upon the question of proximate cause as announced above and are in harmony with the rule announced by the Idaho Supreme Court in *Rowe vs. Northern Pacific Ry. Co.*, 52 Idaho 649, 17 Pac. (2d) 352, where the court said:

“The conclusion is inescapable that due to the unfortunate thoughtlessness of the car’s occupants and their unwarranted assumption of a clearance at the time not apparent, the car came hurtling through the night with a momentum uncontrollable the remaining distance. The presence of the boxcar merely presented a condition, it was not the proximate cause of respondent’s mishap.”

In the *Ranstrom* case it was said:

“Even admitting the negligence of the defendant, where the negligence of the driver is the proximate cause of the accident neither the driver nor the passenger can recover.”

That the driver’s acts and conduct were the proximate cause would have been much more apparent to the jury if the court had given appellants’ requested instruction No. 7 and the last paragraph of No. 9.

As appears from the decisions above referred to in connection with proximate cause, the fact that the person who constituted the responsible agency in producing the proximate cause was negligent does not destroy the defense of proximate cause, as is apparent from the decisions in the *Rowe* case and the *Ranstrom* case which we have just cited. The statement is also supported by the decisions of the United States Supreme

Court, one of which is Atlantic Coast Line R. Co., vs. Driggers, 279 U. S. 787, in which it was held:

“No liability under the Federal Employers Liability Act exists where the negligence of the injured employee himself was the sole and direct cause of the accident.”

In the body of the opinion the court, after reviewing the facts, says:

“Under these circumstances it is clear that Driggers by his own negligence as the sole and direct cause of the accident brought on his own death, and that there is no ground upon which the liability of the Railroad Company may be predicated.”

III.

THE EVIDENCE IS WHOLLY INSUFFICIENT TO
SUPPORT THE VERDICT AND JUDGMENT FOR
THE SUM OF \$1,250.00 EACH FOR THE DEATHS
OF NINIP TOANE AND HELENE TOANE

(See Specifications of Error II, III and XV)

The court instructed the jury that the right to recover damages for the deaths of Ninip Toane and Helen Toane was "limited to the reasonable expectation of pecuniary benefits to particular individuals that may be proven in this case. If you find that no individual was deprived of a reasonable expectation of pecuniary benefits on account of the death of Ninip Toane or Helen Toane you will not award any damages to any one on account of the death of either of them." (R. 199-200.)

The court's instruction was correct.

Michigan C. R. Co., vs. Vreeland, 227 U. S. 59,
70, 57 L. Ed. 417, 422;

American RR Company vs. Didricksen, 227 U. S.
145, 57 L. Ed. 456;

Gulf C. & S. F. Ry. Co., vs. McGinnis, 228 U. S.
173, 57 L. Ed. 785;

Garrett vs. L. & N. R. Co., 235 U. S. 308;

Kansas City Southern R. Co., vs. Leslie, 238 U. S.
599;

Williams vs. Southern Pac. Co., 202 Pac. 356, 360.

The evidence with reference to pecuniary loss, if any, sustained by anyone as a result of the death of Helen Toane is that during Helen Toane's lifetime she had contributed money to her mother, Adelia Tootath Weiser not to exceed \$100.00, and about \$20.00 worth of groceries at various times. The testimony concerning this is as follows:

"Q. Do you know how much money Helen Toane gave altogether during her lifetime?

A. She don't know exactly, maybe better than a hundred dollars. She really doesn't know.

Q. Do you know how much food Helen Toane gave you when she was alive?

A. Sometimes she buys her about twenty dollars worth of groceries and sometimes she buys her a shawl.

Q. How often would she buy you food?

A. Sometimes it would be two weeks about, other times it would be a longer period than that.

Q. Sometimes it would be two weeks?

A. Yes.

Q. Could you tell us about how many times a month or a moon Helen Toane gave you food?

A. She said about every two months *sometimes*.

Q. Did this continue or last since she married Ninip Toane, or was it just part of the time,—did this last all of the time after she married Ninip Toane or part of the time after Helen Toane married Ninip Toane?

A. She said when she was small I used to provide her groceries and after she grew up she helped provide groceries for me.

Q. Are you married now?

A. Yes, to Sam Weiser."
(R. 122-123.)

The testimony concerning the contributions made is so uncertain and so unreliable that we believe it will not support any award whatsoever, but the most that can be said that it will support is an award of \$100.00. The witness was not at all certain even as to this amount, nor was she certain as to the amount of food that Helen Toane bought her, either as to the amount paid for the food or the frequency of the purchases, or the period over which such purchases extended. Her mother, Adelia Weiser, testified that she was a grown woman at the time of the Nez Perce War, which was in 1877. If we assume that she was twenty years old at that time she would now be 86 years old. Helen Toane died over two years ago, so Adelia Weiser, so far as we can estimate from the testimony, was 84 years of age at the time Helen died, and according to the American Experienced Tables of Mortality, of which the court has judicial knowledge, her life expectancy was 3.08 years, two years of which had elapsed at the time of the trial. That is the greatest period of time that we may assume Adelia Weiser would have received either money or groceries, or anything else from Helen Toane. It is difficult to conclude from the evidence that Adelia Weiser sustained any pecuniary damages even on account of these few and uncertain contributions, for she says that she was

provided sustenance from the Fort Hall Agency afterwards in substantially the same manner as before the death of Helen Toane. She sewed buckskin and also received a pension through the agency, both before and after Helen's death (R. 124). There is no evidence that anyone else sustained any damages on account of the death of Helen Toane. Ninip Toane contributed nothing. (R. 121.)

With respect to Ninip Toane, the only testimony is that of his blind father, who was a very old Indian and who lives with his daughter at Fort Washakie, Wyoming (R. 170). His father's testimony is as follows:

"Q. Did Ninip Toane contribute to your support during his lifetime?

A. He contributed very little.

* * * *

Q. When was the last time you lived with him?

A. He doesn't remember exactly the years, it is quite a while back."

From this testimony there was nothing from which a jury could find a verdict for any amount. Accordingly it is clear that the jury wholly disregarded the instructions of the court and the evidence relating to damages.

Elements of damage within the realm of possibility but not fairly shown to be reasonably probable should be excluded in fixing an award.

Olson vs. U. S., 292 U. S. 246, 78 L. Ed. 1236.

The lower court should have corrected this, as to each Indian upon the grounds stated in par. I (b) and 1 (c) and par. II of the motion for new trial (R. 79-81).

IV.

THE COURT ERRED IN ADMITTING EVIDENCE WITH REFERENCE TO FUNERAL EXPENSES

(See Specifications of Error IV and VI)

As set forth in specification of error No. VI, the court admitted evidence as to the reasonable cost or expense of fruits, vegetables and other things amounting to \$100.00, and also admitted in evidence appellee's Exhibits 1 and 1a, covering the amount paid by the Agency from the Account of or out of the funds of the estate of Ninip Toane for food consumed in the amount of \$63.28 (R. 111-112), to which proper and specific objections were made as appears in said specification of error VI.

The only competent evidence concerning the value of food is that which was contained in Exhibit 1, and which was paid from the account of Ninip Toane. The \$100.00 estimate given by the witness Lizzie Pokibro (R. 111) appears to be food furnished by others and not by anyone who was a beneficiary, and certainly no other person could furnish such articles and expect others to pay for them, for they were not legally bound to supply them, were volunteers and may not recover for such expenditures.

Iowa Homestead Co. vs. Des Moines Nav. RR Co.,
84 U. S. 153;

In Re Malko Milling & Light Co., 32 Fed. (2d)
825, 828;

and particularly:

Vining vs. Rexford (3rd Cir.) 201 Fed. 904.

It was also testified that one beef belonging to Ninip Toane was slaughtered for the funeral and that the value of this beef was \$90.00 (R. 162-163), but this, together with the amount of \$63.28 paid by the Agency from the account of Ninip Toane (R. 113) as well as all other items relating to funeral expenses, was not admissible as evidence, for the Federal Courts have held with no exception that funeral expenses may not be recovered in a suit for damages on account of the death of a person.

The Culbertson, (3rd Cir.) 61 Fed. (2d) 194:

Hutchinson vs. West Jersey & S. R. Co., 170
Fed. 615;

Philadelphia, etc. R. Co., vs. Marland, 239 Fed. 1;

D. L. & W. R. Co., vs. Hughes, 240 Fed. 941, 943;

Heffner vs. Pa. RR Co., (2nd Cir.) 81 Fed. (2d)
28, 31;

Saucer vs. Willis-Overland Company, 49 Fed.
(2d) 385;

Hoffman vs. Reading Co., 12 Fed. Supp. 1010;

Collins vs. Pa. RR Co., 148 NY Supp. 777.

A cogent reason for so holding is that an heir or beneficiary has not sustained damages merely on account of the

diminution of the estate, for before the heir could ever inherit the ancestor must have died, with the resulting expenditure by his estate of the expenses naturally and necessarily incidental to his burial.

V.

LIABILITY CANNOT BE IMPOSED ON DEFENDANTS IN THE ABSENCE OF NEGLIGENCE, AND NO "DAMAGES" "ACCRUED"

Under this heading we may properly and conveniently discuss specifications of error V, VIII, IX, X, XI, and XIV. This court has held that under the statute and the bond executed as required therein it is not necessary for the Government to allege and prove negligence (113 Fed. (2d) 212). Now that the case at Bar has come to trial upon the same statute and bond but upon a different cause of action many things have developed which we think establish the necessity for a reconsideration by this court of the question of negligence involved in its previous decision.

We think that a fair interpretation of the statute involved is that no new right of action for death is created. The Act referred to (Section 14) mentions nothing about any form of action, it merely requires that the railway company shall execute a bond to the United States "* * * conditioned for the *due* payment of any and all *damages which may accrue* by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the

construction or operation of said railway, or by reason of fires originating thereby; the *damages* in all cases, in the event of failure by the railway company to affect an amicable settlement with the parties in interest to be recovered in any court" etc. (Italics ours.) The law says that the bond is to be conditioned for the due payment of damages which "may" accrue. It doesn't say that damages *will* or *shall* accrue when an Indian is injured or killed. Therefore neither the statute nor the bond create any new or substantive right.

This law, and the treaty or agreement upon which it was based, says nothing about the need of protecting Indians in actions for damages except the execution of the bond. The Indians' rights were considered "jealously guarded and protected" when Congress compelled the railroad to pay for the land it was occupying, and required the filing of a bond to secure the payment of any damages which might accrue on account of the killing or maiming of any Indian as that language was then and still is commonly understood both in legal and common parlance, and which seems quite clear to have been the sole purpose of the agreement which Congress ratified (25 Stat. L. 452). Section 14 undoubtedly was thrown in to afford protection to the Indians in the event the railroad was financially unable to pay damages for a violation of an existing right which the Indians might have (depending upon the facts) along with other human beings. It certainly is as reasonable to suppose that Congress knew of the financial hazards the building of a new railroad entailed into country that first had to be developed before the railroad would receive any profit as it is to say that "there is nothing

in the committee report indicating uneasiness in Congress concerning the solvency of the railroad." Neither is there anything in the report which indicates that Congress was uneasy about the Indians being adequately protected if they had the same rights as others for damages "which may accrue." The report of the Committee in Congress (R. 50-56) does mention the fact that "indemnification by the railway company" was also provided in the bill and that, in and of itself, shows that the bond was to be given only as security. "Indemnity" means

"* * * * a *collateral* contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person."

Black's Law Dictionary (2d Ed.) 616.

The law as contended by this court is considered as a statute creating a new right, and certainly is in derogation of common law so far as personal injury and property damages are concerned.

"No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."

Shaw vs. Merchant's Nat. Bank of St. Louis, 101 U. S. 557, 25 L. Ed. 89.

See also:

Globe-Rutgers Fire Ins. Co., vs. Draper (9. Cir.) 66 Fed. (2d) 985;

Cox vs. St. Anthony Bank & Trust Company, 41 Idaho 776, 242 Pac. 785;

Sprague vs. Magee, 46 Idaho 622, 269 Pac. 993.

“The rules of the common law are not to be changed by doubtful implication, nor overturned, except by clear and unambiguous language.”

25 R. C. L. 1054.

No right of action for death existed at common law.

The City of Vancouver (9 Cir.) 60 Fed. (2d) 793, 795;

Jenkins vs. Pullman Co. (9 Cir.) 96 Fed. (2d) 405, 409.

“* * * * when a lawmaking body passes a statute which, because of necessity, subjects a person to a liability to which he was not theretofore subject, the statute should be strictly construed.”

Morrow vs. Asher, 55 Fed. (2d) 365, 367.

See also:

Ross vs. Jones, 22 Wall 576, 22 L. Ed. 730.

The rules above announced are so well established as to require no further support of authorities.

In U. S. vs. Shreveport Grain & El. Co., 287 U. S. 77 at page 83, the court, speaking of committee reports, said:

“In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be

resorted to for the purpose of construing a statute contrary to the natural import of its terms. *Wisconsin R. R. Commn. v. C. B. & Q. R. Co.*, 257 U. S. 563, 588-589; *Penna. R. Co. v. International Coal Co.*, 230 U. S. 184, 199; *Van Camp & Sons v. American Can Co.*, 278 U. S. 245, 253. Like other extrinsic aids to construction their use is 'to *solve* but *not to create* an ambiguity.'" *Hamilton v. Rathbone*, 175 U. S. 414, 421." (*Italics ours.*)

In the case at Bar the only purpose that can be served by resort to the words "jealously guarded" is to place a false emphasis and interpretation upon words which have both a clear and well established law and lay significance with a view to creating confusion in place of clarification. We think it is not an answer to these rules of law to say that because the Indians are wards of the Government the language of the statute should be given, as to them, an aided or unusual construction. That might be so as between the government and the wards, but in this case and similar cases the appellants' rights are involved also. In our brief upon the previous appeal, case No. 9403, 113 Fed. (2d) 212, we called attention, at pages 18-19, to the inapplicability of the rule governing the relation of the Government and its wards, as stated in *Alaska Pacific Fisheries vs. U. S.* 248 U. S. 78, cited at page 214 of the opinion to third parties with respect to whom no such rule had ever previously been announced, but we assume that this distinction escaped the attention of the court and the rule was consequently misapplied. The law as construed by the court is tantamount to making the provisions of the statute a penalty, and it cannot be said that it was in contemplation of the Indians and the Government that the rule should

be as announced by this court, for everything, it seems to us, points in the opposite direction. We believe that when Congress passed the Act it should have put in the statute words which clearly indicated that negligence was not a prerequisite to recovery if that was the intent; not having done so we believe that this court was in error in construing the statute so as to eliminate the necessity of pleading and proving negligence. It would have been so easy for Congress to have declared its intention to make the railroad company and its surety unconditionally liable if that had been its purpose, and it must be assumed that it would have done so if it had intended to make such a drastic departure from the settled rules.

Cases relating to fires, and the killing of livestock we think go no further than to make the act *prima facie* negligence and do not render the defendants liable as insurers. The legislatures in passing those acts clearly expressed their intent and left nothing for the court to construe. In cases such as the one at Bar we are dealing also with a human element, where both intelligence and the instinct and obligation of self-preservation exist, and we believe it was never the intent of Congress—certainly not expressed—that Indians should recover for a wrongful act of their own and which was the proximate cause of their misfortune. Whether a person be a ward or one that is emancipated, the law has never gone that far, and so in passenger cases, even if the railroad company might be considered an insurer there can be no recovery if the passenger's act or conduct was the proximate cause of his injuries. This exception seems to be quite clearly expressed in *Chic.*

R. I. & P. RR Co. vs. Zerneck, 183 U. S. 582, cited by this court in its opinion.

The rule of proximate cause is applied generally in suits based on the Federal Employers Liability Act, a highly remedial statute, to which a liberal construction is given.

See Note 367, Page 318, Sec. 51, Title 45, U. S. C. A.

Also to the Federal Safety Appliance Act (27 Stat. 531), the most highly remedial of all humanitarian statutes.

"By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers," and by an omission of the duty the carrier incurs "the liability to make compensation to any employe who is injured because of it." L. & N. Railroad Company vs. Layton, 243 U. S. 617, 620, 621.

In the foregoing case and in the following others it is held that there can be no recovery under the statute unless its violation was the proximate cause of the injury.

St. Louis & S. F. R. Co. vs. Conarty, 238 U. S. 243;

McCalmont vs. Penna. R. Co. (CCA) 283 Fed. 736, 737 (3); (certiorari denied in 260 U. S. 751);

Lang vs. N. Y. Central R. Co., 255 U. S. 455, 458;
Powell vs. Waters (Ga.), 190 S. E. 615, with
numerous authorities cited at pages 618-619.

In the Conarty case it was said,

“The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in injury to the deceased.”

The judgment of the lower court in favor of the plaintiff was reversed.

Section 13 of the Act requires the Railway Company to fence its track where it runs through improved land. This would indicate that it was not the intention to discard negligence or proximate cause, for if the Railway Company was to be held liable absolutely and in any event, why require the Railway Company to fence except to keep the animals from getting killed? But we are dealing with liability—legal liability—under the statute, so if the Railroad Company constructed a lawful fence (and the Act doesn't say any other is required) we know from experience, and we think the court will take judicial notice of the fact also, that a lawful fence will not restrain sheep and hogs. Is the Railway Company then to be held liable where it has fully complied with the statute? If so, its act of fencing constitutes a useless act, or, having constructed a lawful fence and animals in exercising some of their propensities, either normal or vicious, knocked the fence down and are later injured and killed by a train, can it be said under any reasoning, law, or otherwise, that the

Railroad Company is responsible? If it can be thus said, then we submit the court must do so by judicial legislation, an act which the courts have always said will not be performed.

Section 14, in our opinion, merely implemented the existing Idaho death statute which was then in effect, Idaho Code of Civil Procedure (1881) Section 192. (Appendix 2.) See Section 5-311 Idaho Code Annotated, 1932; and as to personal injuries, it merely implemented the common law and gave security for payment for any rights the Indians *may* have as a result of existing law.

We believe that it is unnecessary to consider the reports of Congress in interpreting this Act, for the language appears to be clear and unambiguous.

“They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms.”

U. S. of America vs. Shreveport Grain & Elevator Co., 287 U. S. 77, 77 L. Ed. 175, 178.

Nowhere in the Act is there a separate statement or section concerning liability. Section 14 merely requires the giving of a bond to secure what? To secure the payment of any liability that *may* legally arise from the violation of a duty owed by the Railroad Company to the Indians. No statute or common law duty has been violated by the railway company, hence no liability on the bond.

In cases involving shipments of nonperishable freight the rule is that carriers are liable as insurers, upon the theory that the carrier has the exclusive possession of the goods, but in

those cases the carrier has always been relieved from liability for “* * * loss or injury proximately resulting from the act or fault of the shipper or owner, without fault on the part of the carrier. This further exception to the carrier’s common law liability comprehends every case where a loss is caused by the shipper’s act, whether that act is one of *negligence*, *misconduct*, or *misfortune*.” (Italics ours.)

9 Am. Jur. 865, Sec. 728.

“The rule which should be applied is established by many decisions. ‘The legislature must be presumed to use words in their known and ordinary signification.’ *Levy v. M’Cartee*, 6 Fed. 102, 110, 8 L. Ed. 334, 337. ‘The popular or received import of words furnishes the general rule for the interpretation of public laws.’”

Old Colony R. Co., vs. Commr. of Internal Revenue, 284 U. S. 552, 76 L. Ed. 484, 489.

Therefore the word “damages” in the Act should be construed accordingly.

“* * * in statutes or other legal instruments giving compensation for ‘damages,’ the word *always* refers to some *actionable wrongful* loss, injury, or harm which results from the *unlawful* act, omission, or negligence of another.” (Italics ours.)

15 Am. Jur. 387, Sec. 2.

In the case of *Holmes vs. Holmes*, 64 Ill. 294, 297, the Supreme Court of Illinois, quoting from *Greenleaf on Evidence*, says:

“Damages are given as a compensation, recompense or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less.”

Webster's International Dictionary describes damages as:

“The estimated reparation in money for detriment or injury sustained.”

Worcester defines it as “payment for or indemnity for injuries.”

From such authorities it must be presumed that Congress in using the word “damages” did not refer to or impose a penalty upon the Railroad Company and referred to only such damages as the Indians were entitled to under the common law.

No wrongful act of the Railroad Company having been committed no damages accrued to the Indians or their survivors.

The other points urged herein are, we submit, sufficient for a reversal of the verdict of the jury and the judgment entered thereon, but we respectfully urge the court to reconsider the question of negligence, for we cannot think that Congress ever intended to give to the statute the effect this court gave to it in its previous decision.

Respectfully submitted,

H. B. THOMPSON

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APPENDIX "1"

From 25 Stat. L. 452

AN ACT to accept and ratify an agreement made with the Shoshone and Bannock Indians, for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purpose of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a certain agreement made and entered into by the United States of America represented as therein mentioned, with the Shoshone and Bannock Indians resident in the Fort Hall Reservation in the Territory of Idaho, and now on file in the office of Indian Affairs, be, and the same is hereby, accepted, ratified, and confirmed. Said agreement is executed by a duly certified majority of all the adult male Indians of the Shoshone and Bannock tribes occupying or interested in the lands therein more particularly described, in conformity with the provisions of article eleven of the treaty concluded with said Indians July third, eighteen hundred and sixty-eight (Statutes at Large, volume fifteen, page six hundred and seventy-three), and is in the words and figures following, namely:

"Memorandum of an agreement made and entered into by the United States of America, represented by Robert S. Gardner, U. S. Indian Inspector, and Peter Gallagher, U. S. Indian Agent, specially detailed by the Secretary of the Interior

for this purpose, and the Shoshone and Bannock tribes of Indians, occupying the Fort Hall Reservation in the Territory of Idaho, as follows:

ART. I. The said Indians agree to surrender and relinquish to the United States all their estate, right, title and interest in and to so much of the Fort Hall Reservation as is comprised within the following boundaries, that is to say: and comprising the following lands, all in town six (6) south of range thirty-four (34) East of Boise Meridian.

West one-half section twenty-five (25); all of section twenty-six (26); east one-half section twenty-seven (27); northwest quarter section thirty-six (36); north one-half section thirty-five (35); northeast quarter of southwest quarter section thirty-five (35) northeast quarter of northeast quarter of section thirty-four (34); comprising an area of eighteen hundred and forty (1840) acres, more or less, saving and excepting so much of the above-mentioned tracts as has been heretofore and is hereby relinquished to the United States for the use of the Utah and Northern and Oregon Short Line Railways.

The land so relinquished to be surveyed (if it shall be found necessary) by the United States and laid off into lots and blocks, as a townsite, and after due appraisement thereof, to be sold at public auction to the highest bidder, at such time, in such manner and upon such terms and conditions as Congress may direct.

The funds arising from the sale of said lands, after deducting the expenses of survey, appraisement, and sale, to be

deposited in the Treasury of the United States to the credit of the said Indians, and to bear interest at the rate of five per centum per annum; with power in the Secretary of the Interior to expend all or any part of the principal and accrued interest thereof, for the benefit and support of said Indians in such manner and at such times as he shall see fit.

Or said lands so relinquished to be disposed of for the benefit of said Indians in such other manner as Congress may direct; and

WHEREAS, in or about the year 1878 the Utah and Northern Railroad Company constructed a line of railroad running north and south through the Fort Hall Reservation, and has since operated the same, without payment, of any compensation whatever to the said Indians, for or in respect of the lands taken for right of way and station purposes; and

WHEREAS the treaty between the United States and the Shoshone and Bannock Indians, concluded July 3, 1868 (15 Stat. at Large, page 673) under which the Fort Hall Reservation was established, contains no provisions for the building of railroads through said reservation: Now, therefore,

ART. II. The Shoshone and Bannock Indians, parties hereto, do hereby consent and agree that upon payment to the Secretary of the Interior for their use and benefit of the sum of (\$8.00) eight dollars for or in respect of each and every acre of land of the said reservation, taken and used for the purposes of its said railroad, the said Utah and Northern Railroad Company shall have and be entitled to a right of way not exceeding two hundred (200) feet in width,

through said reservation extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof, together with necessary grounds for station and water purposes according to maps and plats of definite location, to be hereafter filed by said company with the Secretary of the Interior, and to be approved by him, the said Indians, parties hereto, for themselves and for the members of their respective tribes, hereby promising and agreeing to, at all times hereafter during their occupancy of said reservation, protect the said Utah and Northern Railroad Company, its successors or assigns, in the quiet enjoyment of said right of way and appurtenances and in the peaceful operation of its road through the reservation.

ARTICLE III. All unexecuted provisions of existing treaties between the United States and the said Indians not affected by this agreement to remain in full force; and this agreement to take effect only upon ratification hereof by Congress.

“Signed at the Fort Hall Agency, in the Territory of Idaho, by the said Robert S. Gardner and Peter Gallagher on behalf of the United States, and by the undersigned chiefs, headmen, and heads of families and individual members of the Shoshone and Bannock tribes of Indians, constituting a clear majority of all the adult male Indians of said tribes occupying or interested in the lands of the Fort Hall Reservation in conformity with article eleven of the treaty of July 3, 1868, this twenty-seventh (27) day of May, A. D., one thousand eight hundred and eighty-seven (1887).”

(Here follow the signatures.)

* * * *

SEC. 11. That there be, and is hereby, granted to the said Utah and Northern Railway Company a right of way not exceeding two hundred feet in width (except such portion of the road where the Utah and Northern and the Oregon Short Line Railways run over the same or adjoining tracks, and then only one hundred feet in width) through the lands above described, and through the remaining lands of the Fort Hall Reservation, extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof;

* * * *

SEC. 13. That said railway company shall fence, and keep fenced, all such portions of its road as may run through any improved lands of the Indians, and also shall construct and maintain continually all road and highway crossings and necessary bridges over said railway, wherever said roads and highways do now or may hereafter cross said railway's right of way, or may be, by the proper authorities, laid out across the same.

SEC. 14. That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannock tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation

of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to affect an amicable settlement with the parties in interest to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States; Provided, That all moneys so recovered by the United States attorney under the provisions of this section, shall be covered into the Treasury of the United States, to be placed to the credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior.

APPENDIX "2"

Idaho Code of Civil Procedure,
(11th Sess. 1881) Section 192

Sec. 192. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.

No. 10675

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

OREGON SHORT LINE RAILROAD COMPANY, A CORPORATION,
SAINT PAUL-MERCURY INDEMNITY COMPANY OF
ST. PAUL, A CORPORATION, AND UNION PACIFIC RAIL-
ROAD COMPANY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10675

**OREGON SHORT LINE RAILROAD COMPANY, A CORPORATION,
SAINT PAUL-MERCURY INDEMNITY COMPANY OF
ST. PAUL, A CORPORATION, AND UNION PACIFIC RAIL-
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v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court wrote no opinion.

JURISDICTION

This suit was brought by the United States on behalf of the Shoshone and Bannock Tribes of Indians under authority of the Act of September 1, 1888, 25 Stat. 452, to recover damages accruing by reason of the killing or maiming of certain Indians in the operation of the defendant's railroad within the Fort Hall Indian Reservation in Idaho, and the jurisdiction of the district court was invoked under section 14 of

that act (R. 3). Judgment in favor of the United States was entered on October 20, 1943 (R. 77-78). Notice of appeal was filed on January 3, 1944 (R. 83-84). The jurisdiction of this Court rests on section 128 of the Judicial Code, as amended, 28 U. S. C., sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the Act of September 1, 1888, imposes absolute liability upon the railroad for damages accruing by reason of the killing or maiming of Indians in the course of the operation of the railroad.
2. Whether the evidence supports a finding that the acts of the Indians were not the proximate cause of the collision.
3. Whether the court erred in admitting evidence as to the funeral expenses.
4. Whether the evidence is sufficient to support the verdicts for the deaths of Ninip and Helen Toane.

STATUTE INVOLVED

Section 14 of the Act of September 1, 1888, 25 Stat. 452, is set forth in the statement at pages 3-4, *infra*.

STATEMENT

The Fort Hall Indian Reservation was established for the Shoshone and Bannock Tribes by the Treaty of July 3, 1868, 15 Stat. 673, which in part provided that no persons, except those designated, were ever to be permitted to pass over the reservation. Neither the Oregon Short Line Railroad Company nor its

predecessor, the Utah and Northern Railway Company, was one of the persons authorized to go upon the reservation (R. 4-5). Nevertheless, the Utah and Northern Railway Company, without any right to do so, constructed a railroad across the reservation (R. 52). To relieve the situation, the United States entered into a supplemental agreement with the Indians for the granting of a right of way to the company (R. 52-53). This agreement was incorporated into the Act of September 1, 1888, 25 Stat. 452. It was provided in section 14 of the Act:

That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect an amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States attorney in the name of the United States: *Provided*, That all moneys so recovered by the United States attorney under the provisions of this section shall be covered into the Treasury of the United States, to be placed to the credit of the particu-

lar Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior.

The appellants, Oregon Short Line Railroad Company and Saint Paul-Mercury Indemnity Company of St. Paul, executed the required bond, which was approved by the Secretary of the Interior (R. 7-9).

On October 29, 1941, at a railroad crossing within the Fort Hall Indian Reservation a train operated by the Union Pacific Railroad Company, assignee of the Oregon Short Line, collided with a truck occupied by Frank Poewee, Ninip Toane, and Helen Toane, members of the Shoshone-Bannock Tribe of Indians, resulting in injuries to Frank Poewee and the deaths of Ninip and Helen Toane (R. 60-61, 98-99). The appellants refused to make any settlement therefor (R. 61), and on June 4, 1942, the United States instituted this suit under the authority of the Act of September 1, 1888, to recover damages in the amount of \$10,000.00 for the killing or maiming of the Indians (R. 2-32).¹

¹ The complaint was in seven counts. The first count sought recovery of a total of \$10,000.00 for the killing or maiming of the three Indians (R. 2-12). Each of the second, third, and fourth counts claimed damages in the amount of \$10,000.00 for the killing or maiming of one of the Indians (R. 12-18). Similarly, each of the last three counts demanded judgment for \$25,000.00 against the railroad companies and \$10,000.00 against the surety (R. 18-32). When required to make an election of counts, the United States chose to proceed on the first four counts (R. 95). However, since the total of the awards did not exceed \$10,000.00, the case may be treated as though only the first count had been filed.

The appellants answered, setting up as defenses (1) that recovery under the statute could not be had in the absence of negligence and (2) that the acts and omissions of the Indians were the sole proximate cause of the accident (R. 57-73). The United States moved to strike each of these defenses (R. 73-74). The court granted the motion to strike as to the first of these defenses, on the authority of *United States v. Oregon Short Line R. Co.*, 113 F. 2d 212 (C. C. A. 9, 1940), but denied it as to the second (R. 96-97).

The case was tried before a jury, and the material testimony established the circumstances of the accident to be as follows: Frank Poewee, accompanied by the other two Indians, was driving a truck loaded with long poles in a southerly direction on a highway parallel with the railroad track (R. 138, 153, 173). As he approached the crossing, he slowed down, shifted into first gear, and made a right turn to cross the railroad track, the speed of the truck being five miles an hour at this time (R. 138, 154-155). The distance from the track to the point where he made the right turn was about 27 feet (R. 154, 186). When the truck reached the nearest rail, Helen Toane cried out that a train was coming (R. 138, 188), and shortly thereafter, when the truck was in such position that the headlights were about in line with the farthest rail (R. 178) and the cab was on the track (R. 173), the motor stalled (R. 175, 179, 188) and Poewee could not get it started again (R. 188). The train was then about 200 yards

away, coming from the north at about 40 miles per hour, with whistle blowing and bell ringing (R. 172-173, 178-179). When the engineer saw the situation, he placed the brake in emergency (R. 174, 178), but the collision could not be avoided (R. 179). Both the engineer and brakeman testified to the effect that the truck could have crossed the tracks safely if it had not stalled (R. 173, 178).

With respect to the amount of damages recoverable for the deaths of Ninip and Helen Toane, the court adopted the theory that damages would be measured by the survivors' reasonable expectation of pecuniary benefits and the reasonable funeral expenses paid for by the estates. Accordingly, testimony as to loss of companionship (R. 122, 160-161) and funeral expenses paid by others (R. 108, 163-164, 166) was excluded. Helen Toane's mother, who was about 80 years old at the time of the accident (R. 106), testified that her daughter had given her money and food at various times (R. 121). She was unable to describe the contributions with exactness, but Helen gave her "maybe better than a hundred dollars" during her lifetime, was accustomed to buy her groceries worth about twenty dollars at intervals ranging from two weeks to two months, and sometimes bought her a shawl (R. 122-123). The mother, who had remarried, lived with her husband and before Helen's death earned some money sewing buckskin and received a pension from the Indian Agency (R. 123-124). Ninip Toane's father, who lived with a daughter, testified on direct examination that Ninip "contributed very little" (R. 170). He was not cross-examined (R. 171).

In order to lay a foundation for evidence of the amount of funeral expenses there was testimony that it was the custom at Indian funerals to provide food for the mourners and clothing for the deceased (R. 106-107) and that a reasonable amount to be spent for food, exclusive of meat, at similar funerals was \$100.00 (R. 111). Then evidence was admitted that groceries to the value of \$63.28 had been paid for from the estate of Ninip Toane (R. 112-113) and that a beef, owned by Ninip and valued at \$90.00, had been consumed at the funeral (R. 162-163). Evidence as to the value of another beef, owned by another individual and not paid for by the estate, was excluded (R. 163-164), as was testimony as to the value of clothing furnished the decedents as gifts (R. 166).

At the close of the testimony, the appellants moved for a directed verdict on the ground that the sole proximate cause of the accident was the act of the driver in attempting to cross the railroad track (R. 189-190). This motion was denied (R. 190). The court then instructed the jury to the effect that the Act of September 1, 1888, imposed upon the appellants the duty of indemnifying the Indians for all damages resulting from the operation of the railroad independently of negligence and also losses occasioned by inevitable and unavoidable accident, the only exception to liability being where the acts of the Indians themselves were the proximate cause of the accident (R. 198-199). Proximate cause was defined as "a cause which in its natural and continuous sequence, unbroken by any new cause, pro-

duces an event, and without which the event would not have occurred" (R. 198). The jury was also instructed that damages for the deaths of Ninip and Helen Toane were "limited to the reasonable expectation of pecuniary benefits to particular individuals"; that if no individual was deprived of such expectation, no damages should be awarded; that there could be no recovery on account of grief, mental anguish, or loss of companionship; and that any award for funeral expenses must be limited to such expenses as were found to be reasonable and to have been paid or payable by the beneficiaries (R. 199-200). The court refused to give appellants' requested instructions defining the duty under Idaho law of a traveler upon a highway about to cross a railroad track (R. 212-213) and giving a specific illustration of the application of the instructions on proximate cause (R. 214).

The United States excepted to the instructions insofar as they permitted the defense of proximate cause and limited recovery of damages to the loss of pecuniary benefits and funeral expenses paid by the estate (R. 201-204). The appellants excepted to those parts of the instructions that permitted recovery independently of negligence and in cases of unavoidable accident (R. 205-206), and to the court's refusal to give requested instructions with respect to the duty of a traveler about to cross a railroad track and the example of the application of the definition of proximate cause (R. 208-209).

The jury returned a verdict fixing damages of \$1,250.00 for the death of Ninip Toane, \$1,250.00 for

the death of Helen Toane, and \$2,000.00 for the injuries to Frank Poewee (R. 76). Judgment was entered on the verdict (R. 77-78). Thereafter the appellants filed a motion for judgment notwithstanding the verdict, or alternatively for a new trial (R. 78-82). The motion was denied on November 18, 1943 (R. 83), and this appeal followed (R. 83-84).

ARGUMENT

I

The Act of September 1, 1888, imposes absolute liability upon the railroad for damages accruing by reason of the killing or maiming of Indians in the course of the operation of the railroad

A. *The Act imposes liability independent of the railroad's negligence.*—Appellants' contention (Br. 40-50) that the Act of September 1, 1888, imposes no liability for payment of damages in the absence of any negligence on their part is answered by the decision in *United States v. Oregon Short Line R. Co.*, 113 F. 2d 212 (1940), where this Court held that freedom from negligence is immaterial in an action under the statute, and said (p. 214):

In their popular sense, the words used reasonably import the broad purpose of saving the Indians harmless, or of insuring them against loss even though occasioned by inevitable accident.

On this appeal appellants have not assigned any reasons in support of their position which were not considered previously by this Court. It is submitted,

therefore, that the previous decision should stand as correct.

B. *That the proximate cause of the damages was the act of an Indian is no defense.*—The district court, although recognizing the ineptness of the defense of freedom from negligence, nevertheless held that appellants would not be liable for damages where the acts of the Indians themselves are the proximate cause of the injury (R. 96–97, 198–199). However, it is plain that the defense of proximate cause is invalid for the same reasons which negative the defense of freedom from negligence. It will be recalled that without any right to do so a railroad company (to which appellant railroads are successors) constructed a railroad across the Shoshone-Bannock Reservation, which the United States had guaranteed would remain in the peaceful and exclusive occupancy of the Indians. In order to alleviate the situation in which the company found itself, the United States and the Indians entered into an agreement for the grant of a right of way to the company. This agreement was ratified by Congress and a right of way granted to the company by the Act of September 1, 1888. Thus, the primitive Indians were faced with the threat of unfamiliar and formidable dangers. For the protection of the Indians, Congress, in section 14 of the statute, provided for the execution of a bond conditioned “for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes * * * in the construction or operation of said railway.”

“From a consideration of the statute in its setting it is difficult to conclude otherwise than that Congress intended thereby to surround the Indians with a measure of protection consistent with the increased hazards to which the advent of the railroad subjected them.” *United States v. Oregon Short Line R. Co.*, 113 F. 2d 212, 215-216 (C. C. A. 9, 1940). Whether a particular injury arose from the negligence of the railroad, unavoidable accident, or the negligence of the Indians themselves, the loss to the Indians would be the same. Since the construction and operation of the railroad caused the hazard of injuries to the Indians, including those proximately caused by the acts of the Indians themselves, and the statute requires payment of “any and all damages which may accrue * * * in the operation of said railway” without exception, it is plain that Congress intended the railroad rather than the aborigine to run the risk of all losses. Such an interpretation of the legislation is justified by the principle that statutes for the benefit of Indians are to be liberally construed, keeping in mind “the situation and needs of the Indians and the object to be attained” and resolving all doubts in favor of the Indians. *Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 87, 89 (1918); *Choate v. Trapp*, 224 U. S. 665, 675 (1912). Furthermore, since the act is to be given effect as a law and a grant, it must be strictly construed against the grantee. *Hannibal etc. Railroad Co. v. Packet Co.*, 125 U. S. 260, 271, (1888). Therefore, it is clear that in return for

the privilege of operating the railroad the company was to compensate the Indians for damages which would not otherwise arise. As this Court said in *United States v. Oregon Short Line R. Co.*, 113 F. 2d 212, 216:

We know of no reason * * * why Congress may not, as a condition of its grant of a right of way through an Indian reservation, impose upon a railroad company the full burden of losses to the tribal Indians and their property occasioned by the operation of trains within the borders of the reservation. Cases dealing with general statutes have no application.

II

The evidence supports a finding that the acts of the Indians were not the proximate cause of the collision

Appellants contend (Br. 20-27) that the proximate cause of the collision was the act of Poewee in negligently driving the truck onto the crossing. As shown, *supra*, pp. 10-12, that an injury was caused by the negligence of the Indians themselves would be no valid defense to an action under the 1888 Act. However, even if it were, appellants' contention must fail because it is not supported by the record.

The undisputed testimony was that as the truck was crossing the tracks the motor stalled (R. 175, 179, 188). The brakeman, who was riding in the cab of the locomotive, testified that "he had time to go across I think but he drove up and stopped with the cab right on the railroad track" (R. 173). And

the engineer stated, "I thought for a second or two that he was going over and when I saw that he didn't move I placed the brake in emergency" (R. 178). This testimony shows that the truck could have safely crossed the track if it had not stalled. It is to be inferred that on the basis of this testimony the jury found that the proximate cause of the collision was not that the Indians drove onto the crossing but that the truck's motor stalled. Thus, even if Poewee were negligent in driving upon the crossing, such negligence was not the proximate cause of the accident, but rather the stalling of the motor was an intervening cause which superseded any prior negligence as the proximate cause. *Central of Georgia Ry. Co. v. Faust*, 17 Ala. App. 96, 82 So. 36, 38 (1919), certiorari denied 203 Ala. 248, 82 So. 345; *Cottam v. Oregon Short Line R. Co.*, 55 Utah 330, 187 Pac. 827, 828 (1919). Cf. *Riess v. Pennsylvania R. Co.*, 107 F. 2d 385, 386 (C. C. A. 2, 1939); *Hull v. Seattle, R. & S. Ry. Co.*, 60 Wash. 162, 110 Pac. 804, 806 (1910). Accordingly, the collision must be charged to inevitable accident, for which there would be recovery under this Court's holding in *United States v. Oregon Short Line R. Co.*, 113 F. 2d 212.

Appellants have also assigned as error (Br. 27-33) the court's refusal to give certain requested instructions.² However, these instructions assumed as a fact

² Requested instruction No. 7 (R. 212-213) was as follows:

"You are instructed that the law of Idaho requires travelers upon the highway and about to cross a railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the track. It is also the duty

that the proximate cause of the collision was the failure to take proper precautions before entering the crossing and did not take into account the uncontradicted testimony showing that the accident would not have occurred but for the stalling of the motor. Since the requested instructions singled out particular circumstances and ignored others which were material to the issue, the instructions would have been misleading to the jury and were properly rejected. *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 433 (1892); *Rio Grande W. Ry. Co. v. Leak*, 163 U. S. 280, 287-288 (1896); *Carpenter v. Connecticut General Life Ins. Co.*, 68 F. 2d 69, 73 (C. C. A. 10, 1933). Moreover, the charge was more favorable to appellants without the requested instructions, for from the charge as given the jury could have found that the proximate cause of the accident was the act of the Indian in entering the crossing whether or not the Indian was negligent in so doing.

of the traveler to give way for the passage of trains, and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears."

Requested instruction No. 9 (R. 213-214) was as follows:

"Where a collision occurs at a railroad crossing under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching engine or train and could have plainly seen it, if he had looked, or could have heard its signal if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees."

III

The court properly admitted evidence as to funeral expenses

According to the weight of authority, recovery can be had for funeral expenses which have been paid or are payable by the beneficiaries, provided it appears that such expenses are reasonable in amount. *Jutila v. Frye*, 8 F. 2d 608, 609 (C. C. A. 9, 1925). Cf. *Hartman v. Gas Dome Oil Co.*, 50 Idaho 288, 295 Pac. 998, 999 (1931). And even in those cases in which funeral expenses have been excluded because recovery under the particular death statute was limited to loss of support, it has been indicated that the funeral expenses could be recovered in another action by the estate. *Philadelphia & R. Ry. Co. v. Marland*, 239 Fed. 1, 11 (C. C. A. 3, 1917); *Hoffman v. Reading Co.*, 12 F. Supp. 1010, 1011-1012 (N. J. 1935). Hence, when, as here, the statute provides for the recovery of "any and all damages," it is plain that there can be no objection to the recovery of funeral expenses and other items of damage in one proceeding. Since there was testimony that it was customary to furnish food to mourners at Indian funerals (R. 110) and that two beeves and \$100.00 worth of groceries were a reasonable amount of food for a funeral of the size of the one in question (R. 110-111), the court was correct in admitting evidence that groceries to the value of \$63.28, paid for from the estate of Ninip Toane (R. 113), and a beef worth \$90.00, owned by Ninip (R. 163), were consumed at the funeral.

Appellants contend (Br. 38) that the testimony of Lizzie Pokibro was erroneously admitted because her estimate of \$100.00 as to the value of food appears to include food furnished by volunteers. However, the record shows that when an employee of the Indian Agency had been asked what the agency records showed as having been expended for food consumed at the funeral, an objection was made, one of the grounds being that no proper foundation had been laid, and the following colloquy occurred (R. 108-109):

The COURT. I don't think the proper foundation has been laid as to the reasonableness of the expenditures unless you intend to connect it up. I think that it should be shown that the amount of the expenditure was within the custom of the Indians. I think, however, in order to save time, I will allow this witness to answer.

Mr. CASTERLIN. I will show that. I will have this witness step aside.

Lizzie Pokibro then took the stand and gave her estimate of \$100.00, not including beef, in answer to the following question (R. 111):

Q. Now, Lizzie, tell us what would be a reasonable amount for food for the number of people at the funeral, taking into consideration that the funeral lasted for four days?

Therefore, it is clear that Lizzie's testimony was not admitted for the purpose of proving any specific amount expended for food, but solely to lay a founda-

tion for establishing the reasonableness of the expenditures claimed.

IV

The evidence is sufficient to support the verdicts for the death of Ninip and Helen Toane

In federal courts a jury verdict for unliquidated damages will not be reversed on appeal unless it appears that the verdict is so excessive that it could have been reached only through passion and prejudice. *Southern Ry. Co. v. Bennett*, 233 U. S. 80, 86-87 (1914); *Western Gas Const. Co. v. Danner*, 97 Fed. 882, 890 (C. C. A. 9, 1899); *Arizona & N. M. Ry. Co. v. Clark*, 207 Fed. 817, 824 (C. C. A. 9, 1913); *Swift & Co. v. Ellinor*, 101 F. 2d, 131, 132 (C. C. A. 5, 1939); *American Ice Co. v. Moorehead*, 66 F. 2d 792, 794 (App. D. C. 1933). This is especially true in actions for death where "it is not possible to prove the damage with any approximation to certainty" and "the jury must estimate them as best they can by reasonable probabilities, based upon their sound judgment as to what would be just and proper under all of the circumstances." *Butler v. Townsend*, 50 Idaho 542, 298 Pac. 375, 376-377 (1931); *Southern Pac. Co. v. Lafferty*, 57 Fed. 536, 543-544 (C. C. A. 9, 1893); *Hopper v. Denver & R. G. R. Co.*, 155 Fed. 273, 277 (C. C. A. 8, 1907); *Hepp v. Ader*, 130 P. 2d 859 (Idaho, 1942). Cf. *Jutila v. Frye*, 8 F. 2d 608, 609 (C. C. A. 9, 1925). In view of the testimony in this case, it cannot reasonably be said that verdicts of \$1,250.00 for the deaths of each of two Indians are excessive.

There was testimony that Helen Toane had contributed to the support of her aged mother. The mother was unable to describe the contributions with exactness, but her testimony justified a finding that Helen had given her more than \$100.00 in cash, was accustomed to buy her groceries worth about \$20.00 at intervals ranging from two weeks to two months, and occasionally bought articles of clothing (R. 122-123). If it be assumed that groceries worth \$20.00 were given to the mother once a month, on an average, the contributions of food alone would be worth \$240.00 a year to the mother. Thus, the award for the death of Helen Toane would replace the mother's pecuniary loss for a period of about five years. Appellants contend (Br. 36) that since the mother's life expectancy according to mortality tables was only 3.08 years, that is the greatest period for which the mother's pecuniary loss can be considered. However, even if mortality tables had been in evidence, they would not be conclusive. The jury saw the mother and was entitled to draw its own conclusions as to her life expectancy. Cf. *Philadelphia, B. & W. R. Co. v. Tucker*, 35 App. D. C. 123, 150-151 (1910); *Butler v. Townsend*, 50 Idaho 542, 298 Pac. 375, 377 (1931). Hence, it cannot properly be said that the evidence was insufficient to support a verdict of \$1,250.00 for the death of Helen Toane.

As to Ninip Toane, there was evidence that his estate had furnished for the funeral groceries worth \$63.28 (R. 113) and a beef worth \$90.00 (R. 163). The payment of \$122.50 to the undertaker from

Ninip's estate was also admitted³ so that funeral expenses totalling \$275.78 were paid from Ninip's estate. Therefore, the award for pecuniary loss to Ninip's father is less than \$1,000.00. The only testimony as to contributions made by Ninip to his father was the father's statement that "he contributed very little" (R. 170). This testimony does indicate that he made some contributions, however small, and the jury, having seen and heard the witness, could derive a more definite meaning from the father's tone of voice and demeanor. Furthermore, an award of less than \$1,000.00 for a death does not indicate a basis of any sizable contributions. And since the jury had the opportunity to estimate the life expectancy of the father and determine the period over which the pecuniary loss should be spread, the verdict cannot be regarded as excessive, especially when it has been affirmed by the court in denying the motion for judgment notwithstanding the verdict or for a new trial (R. 83). Cf. *Swift & Co. v. Ellinor*, 101 F. 2d 131, 132 (C. C. A. 5, 1939); *Butler v. Townsend*, 50 Idaho 542, 298 Pac. 375, 376-377 (1931).

³ It was alleged in a Bill of Particulars filed in this case that \$145.00 had been paid to an undertaker, \$122.50 of which had been paid by Ninip's estate (R. 43). In their answer appellants denied that funeral expenses had been incurred in any sum in excess of \$145.00 (R. 61), thus admitting the claim based upon payment to the undertaker. In the charge to the jury the court summarized the content of the answer (R. 195). Appellants must be considered to have again admitted the claim for the undertaker's bill by alleging in their motion for judgment notwithstanding the verdict that the total amount of funeral expenses did not exceed \$500.00 (R. 79), when, exclusive of the undertaker's bill, the funeral expenses did not exceed \$153.28.

Moreover, appellants have no just cause to complain of the size of the verdicts. While the court limited recovery "to the reasonable expectation of pecuniary benefits to particular individuals" (R. 199), this being the measure of damages under a majority of wrongful death statutes, many death statutes are more liberal in allowing recovery for conscious suffering, grief, loss of companionship, etc. For example, section 5-311 of the Idaho Code Annotated (1932) provides that in wrongful death actions "such damages may be given as under all the circumstances of the case may be just," and this section has been interpreted as permitting recovery for loss of companionship. *Hepp v. Ader*, 130 P. 2d 859 (Idaho, 1942). And many death statutes permit recovery for conscious suffering of the decedent. Cf. *St. Louis & Iron Mtn. Ry. Co. v. Craft*, 237 U. S. 648, 657-661 (1915); *Northern Pac. Ry. Co. v. Maerkl*, 198 Fed. 1, 7 (C. C. A. 9, 1912). Inasmuch as the statute herein involved provides for the "payment of any and all damages," the court below would have been justified in construing it liberally to permit recovery for loss of companionship, conscious suffering, and other items of damages. Although the court below excluded all testimony as to damages resulting from loss of companionship (R. 122, 160-161), there was testimony which indicated that Ninip Toane lived for some time after the accident (R. 139, 167-168). If the jury had been allowed to consider such testimony, the verdicts would probably have been greater than they were.

CONCLUSION

It is submitted, therefore, that the judgment appealed from should be affirmed.

Respectfully,

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APRIL 1944.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a corporation, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

Reply Brief of Appellants

Appeal from the District Court of the United States for the
District of Idaho, Eastern Division

H. B. THOMPSON,
Salt Lake City, Utah

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FILED

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Reply Brief of Appellants

STATEMENT

A full statement concerning jurisdiction, questions presented, and other preliminary matters, including a statement of facts, is set forth in appellants' brief and also in appellee's brief, and we will not here restate them but will confine our discussion herein to answer appellee's brief. There is very little if any disagreement between the parties as to the facts involved, and the questions presented, of course, involve only questions of law, upon the facts of the case.

ARGUMENT

We shall answer appellee's brief in the same order it has set up its argument and by using corresponding numbers.

I.

Negligence

A. Appellee naturally relies upon the previous decision of this court to sustain the trial court's action with reference to negligence.

United States vs. Oregon Short Line R. Co., 113
Fed. (2d) 212.

In that case the only question before the court and the only question which it decided was whether or not in an action of this kind it is necessary to allege and prove negligence, and the court held it was not necessary to do so. We have preserved our record in this case and ask the court to review its previous holding in this respect, for the reasons set forth in our opening brief, pages 40 to 50 inclusive.

This question is involved in and will be discussed in connection with the next point, to-wit: promixate cause.

Proximate Cause

B. The agreement between the Government and the Indians was quite clearly premised upon two grounds. One, which related to the terminal of the railroad and the town-site of Pocatello, and the other, to the right of way for the Utah and Northern Railway Company through the reserva-

tion (R.51). It is the right of way through the reservation with which we are concerned in this case, and this part of the agreement was "to ascertain and fix the compensation" to be paid to the Indians for land being occupied by the Utah and Northern Railway Company (R.51), the consent to the use and occupation thereof by the Indians "had not been formally obtained" (R.52). The lands so acquired by the railroad company were by the "agreement relinquished to the United States for the use of the Utah and Northern and the Oregon Short Line railroads," (R.53), for which the railroad paid the sum of \$8.00 per acre. On the same page of the record the report says:

"In this age of progress it is impossible, and it certainly is not desirable, to hinder the building of railroads by blocking the natural routes by great reservations for Indians *or for any other purpose*. Every part of our country must be brought in communication by the best means with every other part, and when the railroad companies ask nothing but the right of way they should have it in the interest of the people." (Italics ours.)

No where does the intention appear that there should be any different legal relation between the railroad and the Indians concerning this right of way than the legal relations existing between the railroad and the white people whose lands the railroad crossed, except that of furnishing an indemnity bond for the payment of "any and all damages which *may* accrue." The purpose of the agreement was to legalize the occupancy of the land held by the railroad for right of way purposes and to fix the compensation therefor. We sub-

mit that nothing further can be established by the agreement, or the law enacted approving the agreement. 25 Stat. L 452 (Appendix "1" of our opening brief).

The report further says that

"this land is now of no benefit to them, and the money for which it is to be sold can be most usefully and profitably invested for them in irrigating ditches, harnesses, cattle, wagons and implements, wheat, etc."

The only difference between acquiring this right of way across the reservation and that across privately owned lands is that in the one case it relates to Indians and in the other to white people. As to reservations, the railroad had to obtain the consent of the Indians and as to privately owned land outside the reservation the railroad had to obtain the consent of the white people either by agreement or through eminent domain proceedings, the effect or consent of either being the same.

The fact that the Government and the Indians conferred and made an agreement shows that the Indians were not incapable of understanding their rights, and we know that even the "primitive" Indian was smart enough to know danger when he saw it, and we dare say he knew that when these trains crossed his reservation he must yield the right of prior passage to the train and if he did not do so he might be killed or seriously injured, and that the danger was not "unfamiliar." It might have been a "formidable" danger, but if it was, and they or the Government wanted to be sure the Indians would be paid damages irrespective of negligence or irrespective of their own actions being the proximate cause, it seems to us

that such a condition would have clearly and plainly been imposed upon the right to a right of way across the reservation.

The rule of liability respecting Indians can be no different whether the accident occurs inside the reservation or outside the reservation, and no apparent distinction is recognized in the agreement. The danger from trains to Indians is just as great in crossing the railroad track outside the reservation as within it, and yet as soon as they leave the reservation they are subject to all of the prevailing rules of law to the same extent and to same effect as white people. If it was the Intention to give them a right of action and protect their interests irrespective of negligence or proximate cause because of threat of "unfamiliar and formidable dangers" arising from the operation of trains it would seem that such protection would have been extended to them wherever they may cross a track, whether inside or outside the reservation. It certainly was never intended that they might recover for suicidal acts or for failure on their part to exercise care for their own protection, which they utterly failed to do in the case at bar. No such intent was even hinted at in either the statute or the agreement approved by the statute, or by the bond executed by the appellants, and clearly such an intent was not "within the contemplation of the parties at the time of the execution of the bond."

American Surety Company vs. Wheeling Structural Steel Company, (4th Cir.) 114 Fed. (2d) 237, and cases cited therein;

Also 15 *Am. Juris.* 451-453, wherein it is said:

"A common statement of the rule is to the effect that the damages recoverable for breach of a contract

are such as may reasonably be considered as arising naturally from the breach of the contract itself, or such as may reasonably be supposed to have entered into the contemplation of the parties when they made the contract."

In the case at bar there was first, no breach of the bond by the railroad company, and secondly, it was not in contemplation of the parties when the contract was made or the statute passed approving the agreement between the Government and the Indians that liability would attach to the railroad company irrespective of negligence on its part, and certainly not when it was lawfully operating its train and the accident could not have been avoided by it but could and should have been avoided by the occupants of the truck if they had looked or listened for the train.

Appellee cites *Alaska Pacific Fisheries vs. United States*, 248 U. S. 78, and *Choate vs. Trapp*, 224 U. S. 66, to the effect that the statutes for the benefit of Indians must be liberally construed, keeping in mind the "situation and needs of the Indians and the object to be obtained."

The object to be obtained in the case at bar was the granting of a right of way and the payment of compensation therefor. There was nothing in the contract with the Indians concerning the giving of a bond.

The case of *Hannibal, etc. Railway Company vs. Packet Company*, 125 U. S. 260, is also cited, which, together with the other two cases we think were clearly distinguished in our brief in the prior case (113 Fed. (2d) 212) at pages 18-20 and 23. As between the Government and the Indians it is the

undoubted rule that statutes are to be liberally construed in favor of the Indians, but those cases do not hold and none can be found which do hold that the same rule ought to be applied to persons or corporations such as appellants. There was full consideration passing between the railroad and the Government representing the Indians and the Indian's rights were "jealously guarded and protected" when the railroad paid for the lands (the purpose of the agreement), and posted the bond to secure the Indians "indemnification" if any of their legal rights were violated and they were entitled to recover.

II.

The acts of the Indians were the sole proximate cause of the collision.

The proximate cause of the collision was nothing the appellants did or did not do, but was the positive and unequivocal acts of the driver or occupants of the truck in driving or permitting it to be driven upon the track immediately in front of the approaching train. The stalling of the automobile on the track cannot be considered an intervening cause, and there was no unbroken sequence which relieved the Indians of their primary duty, for the act of the Indians was continuous from a point of safety where the truck should have been stopped to permit the train to pass up to the time it was stalled on the track; their duty was to avoid danger before getting into it.

"Death resulted because deceased most unfortunately drove her car in front of this train, which had a right to be on the track, and could travel no other

place, which being at that point, at that time, could not have helped but strike deceased, and when she had herself proceeded to the place of danger.

* * * *

“It is alleged that if she had attempted to stop after her view was no longer obstructed, she would have been unable to do so in time to avoid the collision, owing to said slippery condition ‘and was confronted with an emergency.’ *Deceased created the emergency*, and this was not effectively looking and listening when in a place of safety, nor making careful observation to ascertain whether she could safely proceed before going upon the track.” (Italics ours.)

Whiffin vs. Union Pacific R. Co., 60 Idaho 141,
89 Pac. (2d) 540.

The accident was not inevitable because if the Indians had heeded the train approaching within plain view and taken no chances, there could have been no risk of injury either with or without the motor stalling.

This was not an “inevitable accident.” There is no dispute upon the facts as to what these Indians did or did not do as they approached the crossing, and we think that it must be conceded that by proper action on their part the collision could and should have been avoided and that it could not have been avoided by the appellant. The Indians never knew the train was approaching until the front of the truck reached the first rail, when Helen Toane shouted “here comes a train” (R.155) and then the auto stalled (R.188). The striking of the car by the engine followed immediately.

The facts are undisputed that the train’s headlight was

burning brightly, the whistle was being sounded and the bell was ringing (R.172, 178), and as soon as the auto came up to the track and stalled everything was done by the engineer to avoid a collision (R.174-179). The collision could not have been avoided by the engineer (R.181). The train had the prior right of passage and was not required to stop or reduce its speed until the operators of the engine discovered that the driver of the truck was not going to stop before reaching the track and was not going to accord the train the right of way.

McIntire vs. Oregon Short Line RR Company, 56 Idaho 392, 55 Pac. (2d) 148;

Whiffin vs. Union Pacific RR Company, 60 Idaho 141, 89 Pac. (2d) 540.

It cannot therefore be claimed that the proximate cause of the collision came from any act or failure to act on the part of the appellants or their agents, servants or employees, but on the contrary the failure of the occupants of the truck to perform the duty imposed upon them constituted the sole proximate cause.

The case of *Cottam vs. Oregon Short Line RR Company* (Utah) 187 Pac. 827, cited by appellee, is clearly not in point, for there the jury found on conflicting evidence that the engineer was not maintaining any lookout, and if he had been the "operators of the engine could have stopped the same before reaching the place of accident." In the case at bar the evidence is to the contrary and is undisputed.

Reiss vs. Pa. R. Co., 107 Fed. (2d) 385, likewise is not

in point. In that case plaintiff's complaint was dismissed by the trial court and that action was affirmed by the court of appeals, in which the court said:

"* * * If we * * * assume that the truck did become motionless on the crossing, we find no basis for the further inference that the truck was in that position long enough for the engineer to have observed it and stopped the train short of the crossing."

Hull vs. Seattle R & S. Ry. Co. (Wash.) 110 Pac. 804, is not in point, for in that case it appears that the track was straight for 400 to 450 feet and the automobile stalled on the track could have been plainly seen for that distance, and the train

"* * * could have been stopped, as the motorman himself says, within a distance of from 160 to 170 feet; that when the car became stranded, and the passengers sought to attract the attention of the motorman to its position, the motorman was not at the motor, and did not reach it until the train had approached to within 60 feet of the automobile, too late to materially check its speed before it crashed into the car."

The case of *Central of Ga. Railway Company vs. Faust*, 82 So. 36, is also clearly distinguishable, for it shows excessive speed on the part of the train due to the fact that the crossing was so situated that the trainmen could not see the auto until it was within 10 or 15 feet of the track and the driver of the auto could not see the train until the auto was within ten feet of the track; the train approached the crossing at a high rate of speed and without giving the statutory signals and "by

reason of this fact and attending circumstances he lost control of the car and was thereby put in a position of peril by reason of the defendant's negligence." No such a situation exists in the case at bar.

Instructions

Appellants' requested instructions 7 and 9 were correct and should have been given for the reasons set forth on pages 27-33, incl. of our opening brief. The requested instructions were not misleading but correctly informed the jury as to the duties of a traveler approaching and about to cross over a railroad track. They defined the driver's duties in this case as set forth in *Whiffin vs. UPRR Co.*, supra, and also the rights of the operators of the locomotive, *McIntire vs. OSLRR Co.*, supra. The rules of law set forth in those decisions are rules of ordinary care which the traveler must obey or be denied a recovery.

"* * * what will constitute ordinary care in such a case has been precisely defined, * * *. In this special case the amount of care as well as the nature of it has been settled."

Whiffin vs. UPRR Co., supra.

To the same effect:

Koster vs. Southern Pac. Co., (Cal.) 279 Pac. 788, 793;

Shortino vs. Salt Lake U. R. Co. (Utah) 174 Pac. 860, 867;

Wilkinson vs. Railroad (Utah) 99 Pac. 466;

Nuttal v. Denver, RGWR Co., 99 Pac. (2d) 15.

The cases cited by appellee are not in point, because in this case the evidence is undisputed as to the conduct of the driver and the other occupants of the truck; that they failed to look and listen is clear, for had they done so before reaching the track they could have both seen and heard the train and stopped the truck before getting into a zone of danger, and the accident would not have occurred.

“* * * we are dealing with a *standard of conduct*, and when the standard is clear it should be laid down once for all by the courts.” (*Italics ours.*)

Baltimore & Ohio R. Co. vs. Goodman, 275 U. S. 66, 70;

Also *Southern Pac. Co. vs. Day* (9th Cir.) 38 Fed. (2d) 958, 960.

The court should have granted appellants' motion for a directed verdict, but not having done that should have given the jury these requested instructions, for there were no other instructions given which told the jury what constituted proximate cause except that contained in the abstract definition thereof. No where in the court's instructions was there any statement of law concerning the traveler's duty as he approached and was about to cross over the tracks.

III.

Funeral expenses are not recoverable.

The case of *Jutla v. Frye* (9 Cir.) 8 Fed. (2d) 608, and *Hartman v. Gas Dome Oil Co.*, 50 Idaho 288, 295 Pac. 998,

cited by appellee in support of its proposition that funeral expenses constitute a proper element of damages are based upon an Idaho statute giving a right of action for death by wrongful act and providing

“* * * in every action under this and the preceding section such damages may be given as under all the circumstances of the case may be just.” *Section 5-311 Idaho Code Annotated, 1932 Edition.*

An examination of the decisions cited in the note to 17 C. J. 1338, cited in *Jutilla v. Frye*, supra, will show that those decisions dealt with statutes which were broader than the statute now before the court, and the similar Federal Statutes involved in the Federal decisions cited in our opening brief on page 39, and the interpretation of the Idaho statute or the rule applied thereto cannot, of course, stand against the rule of unanimous decisions of the Federal courts in construing the Federal statutes.

Appellee saw fit to base its action upon Section 14 of the Act of Congress (25 Stat L. 452), and not upon the Idaho statute referred to. It is accordingly clear that decisions under the Idaho Act are not controlling on this point. Section 14 refers to “damages which may accrue,” and the Federal Employer’s Liability Act (45 USCA 51) says that the railroad “shall be liable in damages.” Under the latter act funeral expenses are not a proper element of damages and are not recoverable. As one statute is no broader than the other, the decisions cited on page 39 of our opening brief are controlling.

IV.

The evidence does not support the verdicts for the deaths of Ninip and Helen Toane.

Whether we term the excessive verdicts in this case as having been arrived at through passion or prejudice, or through some other means, the result is the same, for there is no competent evidence to support them. The only method by which the jury could have returned verdicts in the two death cases was to disregard entirely the instructions of the court and arrive at some amount without factual or legal basis. The jury was told that recovery was limited "to the reasonable expectations of pecuniary benefits to particular individuals" (R.199) and "elements of damages within the realm of possibility but not fairly shown to be reasonably probable do not form the basis for an award of damages" (R.200).

As to Helen Toane:

During her lifetime Helen Toane gave her mother "maybe better than a hundred dollars. *She really doesn't know.*" (R.122). That will support a verdict for no more than \$100.00 for the death of Helen Toane. If during her lifetime she contributed only \$100.00, it can't be said that she would contribute more than that during her lifetime if she had lived and that of her aged mother, for her mother had approximately reached the end of life's normal span. Even this amount is speculative for Mrs. Weiser's answer as to the amount was that "she really didn't know."

As to purchase of groceries. *Sometimes* she bought her mother \$20.00 worth of groceries (R.122). The frequency

of such purchases was finally summed up by Mrs. Weiser as follows: "She said about every two months *sometimes*." (R.123). That might mean that in two months time she might spend \$40.00 for groceries and then months and even years might elapse before she would make another purchase. A verdict of \$1,250.00 therefore could only be based upon the purest guess or speculation and without any competent evidence as a basis.

As to Ninip Toane:

The only evidence is that given by his aged father, which during his lifetime Ninip Toane "contributed very little" (R.170). No one can even guess or speculate under such testimony what Ninip Toane's father suffered pecuniarily as a result of his death. It will support no amount. The cases cited by appellee are based generally upon the Idaho statute, not applicable in this case, and similar statutes, and accordingly they are not in point. Some are also personal injury cases which also present a different measure of damage.

As shown under point III above, the statute involved does not authorize damages for funeral expenses, and the recovery for death is limited to pecuniary loss, of which none is shown.

Verdicts based upon substantial evidence and not influenced by passion or prejudice will be sustained but verdicts such as those in this case that are arbitrary, capricious and inconsistent will not be upheld.

"It is true that a jury does not have the power to render a capricious and arbitrary verdict in total dis-

regard of the evidence and that the verdict must be consistent with some legal theory of the evidence."

Gay, Sullivan & Co. vs. Glaser, Crandell Co. (7 Cir.) 102 F. (2d) 149.

And the verdict must be based upon evidence reasonably probable.

"Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth."

Olson v. United States, 292 U. S. 246, 257.

See also Michigan C. R. Co., vs. Vreeland, 227 U. S. 59.

Accordingly, the finding of the jury that the beneficiaries of Helen and Ninip Toane suffered pecuniary loss finds no support in the record.

Union Pacific R. Co., vs. Stanger, (9. Cir.) 132 Fed. (2d) 982, 984, 985.

The judgment of the trial court should be set aside and the court instructed to enter judgment for the appellants.

Lowden vs. Bell (8 Cir.) 138 Fed. (2d) 558, 560, 561.

Respectfully submitted,

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Appellants.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a corporation,
SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation, and UNION
PACIFIC RAILROAD COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Petition for Rehearing
and
Brief in Support of Petition
For Rehearing

Appeal from the District Court of the United States for the
District of Idaho, Eastern Division.

FILED

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IN THE
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IN THE
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OREGON SHORT LINE RAILROAD COMPANY, a corporation, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Rehearing

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE JUDGES THEREOF:

Comes now Oregon Short Line Railroad Company, a corporation, Saint Paul-Mercury Indemnity Company of St. Paul, a corporation, and Union Pacific Railroad Company, a corporation, the appellants in the above entitled cause, and respectfully petition for a rehearing in the above entitled

cause for the following reasons and upon the following grounds:

I.

The court erred in refusing to reconsider the question that no recovery can be had in the absence of negligence on the part of the Railroad Company for the reasons set forth in appellants' original brief, pages 40-50, and for the further reasons set forth in our brief and argument following these assignments.

II.

The court erred in failing to consider appellants' Specification of Errors VIII, IX and X, for the reasons set forth therein and for the reason that the court's instruction referred to in said specifications were in direct conflict with the court's instructions defining proximate cause.

III.

The court erred in refusing to hold that the proximate cause of the collision and the ensuing injuries and death was the acts of the Indians in not performing their established duty of stopping, looking and listening for the approaching train, for if they had done so the truck would have stopped before entering upon the track in front of the train. The only inference to be drawn from the evidence is that when Helen Toane cried out that a train was coming the driver (and neither Helen nor Ninip Toane having looked or listened for the train up to that time) immediately applied the brakes and that is what caused the truck to stall on the track.

IV.

The court erred in holding that appellants' requested instructions 7 and 9 were properly refused by the trial court. These instructions correctly stated the law and if the driver or other occupants of the truck had performed their duty of looking and listening for the train there would have been no occasion for Helen Toane to utter a cry of danger; for if they had performed their duty they would have seen or heard the train and the truck would have been stopped before it reached the track.

V.

The court erred in affirming the judgment entered upon the verdicts for the reason that the evidence clearly and unequivocally establishes that no act or failure to act on the part of the appellant Railroad Company constituted a proximate cause of the collision between the train and the truck, without which the appellants cannot be held liable.

VI.

The court erred in sustaining the verdicts for the deaths of Helen and Ninip Toane for the reason that there is no evidence of pecuniary loss sufficient to sustain either verdict, and there was and is no evidence of any other element of damage and no evidence to support the verdicts "when judged by ordinary standards," for which reason the trial court should have set the verdicts aside. State statutes and decisions to the contrary are not applicable and the Federal statutes and decisions are exclusively controlling.

VII.

The court erred in holding that funeral expenses are an element of damage under the Federal statute here involved. There is no proper precedent to form the basis of such holding and the Idaho death statute and decisions thereunder are not applicable. The Idaho statute requires a showing of negligence on the part of the plaintiff and its terms relating to damages are much broader in scope than the Federal statute here involved. The Federal statute in question is comparable to the provisions of the Federal Employers' Liability Act (45 USCA 51), under which funeral expenses are not recoverable, and no just reason appears to apply rulings under a State statute which is neither relied upon or applicable in preference to rulings under a similar Federal act—Congress having covered the entire subject by legislation all State laws and decisions are absolutely and entirely excluded.

VIII.

The court erred in holding that loss of companionship is an element of damage under the Federal statute here involved for the reasons set forth in the next above assignments numbers VI and VII.

The foregoing assignments will be further exemplified in our brief and argument following.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and the judgment of the District Court of the United States for the

District of Idaho, Eastern Division, be, upon further consideration, reversed.

Respectfully submitted,

H. B. THOMPSON,
L. H. ANDERSON,
Attorneys for Appellants

CERTIFICATE OF COUNSEL

I, L. H. Anderson, counsel for the above named appellants, do hereby certify that the foregoing petition for rehearing of this cause is well founded and presented in good faith and is not interposed for delay.

L. H. ANDERSON

L. H. ANDERSON

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a corporation,
SAINT PAUL-MERCURY INDEMNITY
COMPANY OF ST. PAUL, a corporation, and UNION
PACIFIC RAILROAD COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

**Brief in Support of Petition
For Rehearing**

In discussing the grounds of our petition for rehearing we will present them in the same order that they are listed in the petition and with corresponding numbers.

I.

It is with a great deal of hesitation that we again raise the question which was decided adversely to our contention by this court in its decision of June 27, 1940 (113 Fed. (2d) 212), in which the court held that under the statute involved it was not necessary for the United States to plead or prove negligence against the railroad company. However, we are

not convinced that the court was right in so holding and for that reason we urged the same question on this appeal, and we now urge it again and ask that the matter be reconsidered, for it seems to us that the wording of the statute itself, to-wit: Section 14, the circumstances surrounding it, and the well known principles of law, all point to the ultimate conclusion that if Congress had intended to make the liability of the Railroad Company absolute it would have been expressed in the law.

If the statute involved is *sui generis*, then that is all the more reason why Congress should have expressly stated (if it so intended) that the Railroad Company's liability was absolute.

“We must assume that Congress legislated here in the light of the common law.”

Brotherhood of R. & S. Clerks, etc., vs. Norfolk,
Southern Ry Co., (4th Cir.) 143 Fed. (2d)
1015;

and cases cited and referred to on pages 42 to 44, inclusive, of our opening brief.

There is no word or expression in the statute which requires or compels an interpretation contrary to the general rule of law to the effect that the rules of the common law are not to be changed by doubtful implication and except when the language in doing so is clear and unambiguous.

25 R. C. L. 1054.

In this court's first decision, to-wit: 113 Fed. (2d) 212, the court stated:

“The statute does not in terms limit the liability for damage to those occasioned by the negligent operation of the railroad or by reason of fires negligently set.”

The general law, and using the words of the statute in their popular sense, would require the court to hold that the statute does not in its terms impose liability for damages upon the defendant irrespective of negligence.

We think the cases referred to by the court in its first decision are not applicable, as is pointed out by the annotator in 53 A.L.R. 879, where, from the cases cited, he draws a very clear distinction between cases relating to fires and those relating to the injuring or killing of livestock. That is to say, in fire cases, which the Mathews case cited by the court was one, there is nothing a property owner can do to protect himself against the communication of fire and is accordingly entitled to a greater degree of protection than the owner of livestock, and certainly that distinction is true with reference to a person who has the intelligence to protect himself.

In the Humes case, 115 U.S. 512, cited in the footnote of the court's first opinion the distinction is clear, for there the Railroad Company could relieve itself of liability for the killing or injuring of livestock,

“if such fences, gates, farm crossings, and cattle guards, shall be duly made and maintained.”

Double damages were allowed by way of a penalty, which is justifiable in order to compel the Railroad Company to comply with a valid statutory enactment. In that case the Company had an opportunity to avoid damages by complying

with the fencing statute. Here, as the statute is construed, there is no way for the Railroad Company to avoid damages no matter how careful or prudent it may be.

Another phase of the case which the court seems to rely upon as sustaining a holding that negligence is not a prerequisite to recovery is the fact that "these primitive people were perforce exposed to hazards at once unfamiliar and formidable."

We call the court's attention to the fact that the treaty between the Indians and the Government was dated July 3, 1868 and that contrary to that treaty the Utah and Northern Railway Company in 1878 constructed a railroad through the Reservation and operated it for nine years before the agreement was made in 1887 to require the Railroad Company to pay the Indians for the land it was using so that the danger to the Indians at the time of the agreement and also later at the time Congress passed the act approving the agreement cannot be said to have been unfamiliar, and it is only fair to say that with primitive people the fear of such an instrumentality would be greater than to those who are not primitive.

II.

This Court has not passed upon the appellants' specification of errors, VIII, IX, and X, which embraced exceptions to the instructions of the Court in which it charged the jury that the defendant Railroad Company was an insurer and liable for the payment of damages if the loss was occasioned by inevitable or unavoidable accident, nor has it disposed of the conflict between those instructions and the instructions

concerning proximate cause. All that this Court has said in that respect is that in the opinion rendered in *United States vs. Oregon Short Line Railroad Company*, 113 Fed. (2) 212, the Court held that the Act in question imposes liability on the Railroad Company independent of negligence, and later in the present opinion, without discussing whether by the terms of the Act the Railroad Company is an insurer against injury resulting from inevitable or unavoidable accident, and without discussing or deciding whether the instructions on this point excepted to by the appellants were in irreconcilable conflict with the instruction on proximate cause, this Court merely said:

“Here the jury was entitled to find that the proximate cause of the injury was the accidental stalling of the motor, rather than negligence in crossing. The Indians were not trespassers on the railroad track; they had the right to cross it. The jury evidently believed, and it was warranted in believing, that no collision would have occurred had not the motor accidentally become stalled. * * * On this phase of the case we conclude that the jury was entitled to attribute the injury to inevitable accident. Cf. *United States vs. Oregon short Line Railroad Company*, *supra*.”

On the previous appeal the point was not before this Court as to whether the statute imposed liability for damages occasioned by inevitable and unavoidable accident (Error VIII), or whether the defendant Railroad Company was an insurer against loss (Errors IX and X). The only point before the Court was whether the District Judge erred in sustaining a motion to dismiss because negligence was not alleged. We have assigned as error not only the conflict in the instructions above noted but also the charge of the Court that the Railroad

Company was an insurer and liable for inevitable or unavoidable accident, and the opinion does not constitute a disposition of these points by referring to the previous decision in which these points were not presented and all that was said by the Court there with reference to these questions was necessarily dictum. We have assigned these errors in our brief at pages 13 and 14, and discussed them at pages 20-27 as conflicting with and nullifying the instruction on proximate cause, concluding the discussion at pages 26 and 27 by the statement that the trial court should have intelligently instructed the jury on the law of proximate cause and not have set the defense at naught by stating that the Railroad Company was an insurer, even against an inevitable accident.

The verdict of the jury was a general verdict and it does not dispose of these points to say that it "evidently believed—and it was warranted in believing—that no collision would have occurred had not the motor accidentally been stalled" or that they were "entitled to attribute the injury to inevitable accident."

The questions, which we have presented to the Court and which we respectfully submit have not been ruled upon or decided by this Court, are whether the lower court properly construed the statute when instructing the jury that the Railroad Company was an insurer and liable in damages for injury caused by inevitable accident. All that we do know for sure, and without speculation as to what the jury thought, is that the instructions complained of were irreconcilable with the instructions on proximate cause. If the act of the Railroad Company was not the proximate cause there should be no

recovery on that theory, even though the act of the Indians was not the proximate cause.

This Court has not ruled either in the present case or in any other decision, unless it be by dictum which does not constitute a ruling or decision, that the question of proximate cause is irrelevant to the determination of liability under the statute, and if the question of proximate cause was a relevant inquiry, and this Court has not decided it was not, then the instructions above mentioned were in irreconcilable conflict with a proper instruction on proximate cause and accordingly the lower court committed reversible error.

Atlantic Coast Line R. Co. vs. Tiller, 142 Fed.
(2) 718, 722.

Jakeman vs. O.S.L.R.R. Co. 43 Idaho 505, 256
Pac. 88.

Deserant vs. Cerillos Coal R. Co., 178 U. S.
409, 421.

We accordingly respectfully submit that this Court must have inadvertently failed to consider and decide these points which were properly before it but which had not been disposed of.

III.

This point relates to proximate cause, and we believe that the facts of the case do not warrant the holding that the proximate cause of the accident was not the failure of the Indians to stop, look and listen before going upon the track. The facts show that when Helen Toane shouted "here comes a train" the truck was then on the track (R.155) or on the first rail

of the track (R.188) and then the automobile stalled (R. 189). The facts are clear and undisputed that they did not see the train before Helen Toane shouted because they did not look for it, for had they looked before reaching the track they would have seen it and could have stopped before reaching the track and avoided a collision and there would have been no necessity for Frank Poewee to suddenly apply the brakes as soon as Helen Toane cried out that a train was coming and the truck would not have stopped on the track but would have continued on over and no collision would have occurred. Therefore the proximate cause seems definitely to have been their failure to stop, look or listen for the train, as was their duty. If the stalling of the automobile therefore created an emergency from which the Indians could not extricate themselves, such an emergency was brought about entirely by their own failure to ascertain whether they could safely proceed before going upon the track.

Whiffin vs. Union Pacific R. Co., 60 Ida. 141,
89 Pac. (2d) 540.

Proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result.

Lanasa Fruit S. S. & I. Co., vs. Universal Ins. Co.,
302 U.S. 556, 82 L.Ed. 422;

Atkinson T. & S. R. Co., vs. Calhoun, 213 U.S. 1,
53 L. Ed. 671.

In Atkinson T. & S. R. Co., vs. Calhoun, *supra*, the court reversed judgment for the plaintiff and as to proximate cause, said:

“Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. * * * A careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man. * * *”

IV.

Following the point discussed next above is the holding of the court that the trial court did not err in refusing to give appellant's requested instructions 7 and 9. These two instructions correctly stated the law applicable to persons approaching and about to cross over a railroad track, and if, as discussed in point III above, the Indians had performed the duty imposed upon them by law the truck would not have become stalled, and no other conclusion can be reached than that the stalling of the truck was brought about by the driver applying the brakes suddenly when Helen Toane cried out that a train was coming. The court having given the jury the definition of proximate cause and the case submitted to the jury upon that theory, we definitely believe that we were entitled to have those instructions given to enable the jury to apply the definition of proximate cause, for without such

instructions it is only fair to say that the abstract definition to them meant nothing and their minds would be focused directly upon the three instructions of the court referred to in point II above, the result of which was to entirely take away from the jury a consideration of proximate cause. We respectfully call the court's attention to discussion of these two instructions at pages 27-33 of our opening brief.

V.

This point relates to proximate cause and appears to have been overlooked by the court, for it is not discussed in the court's opinion. The facts are clear that the railroad train was operating in a lawful manner in every respect; the headlight was burning, the whistle was blowing, the bell was ringing, the view was unobstructed and as soon as the truck stopped on the track everything was done to avoid a collision. Accordingly there was no act or failure to act on the part of the railroad employees which caused the collision and the resulting injuries and deaths. We think it must be said that the train was operating legally, for it had the right to travel upon the right of way which had been purchased, in the same manner as the Indians had the right to travel upon the highway and cross the tracks at the crossing, provided, of course, that each performed the duty imposed upon him by the law. The Railroad Company did comply with every duty imposed upon it, and whatever might be said concerning the actions of the Indians as to whether or not the proximate cause was the stalling of the truck on the track or the failure of the Indians to observe the train before reaching the track, the facts are definite and clear that the proximate cause of the collision was not the fault or

the result of anything which the Railroad Company did or failed to do.

Even though it may be said that the Act in question imposes absolute liability upon the Railroad Company, nevertheless no law can be found, and none was cited to this court by the appellee, that the Railroad Company or any person can be held responsible for something which it did not proximately cause.

The Federal Employers Liability Act and the Safety Appliance Act, and cases construing those Acts, produce the clearest analogy of the application of the law with respect to such a question, and we call the court's attention to our discussion and authorities on this point on pages 24-26 and 46-47 of our opening brief.

The Safety Appliance Act imposes an absolute duty upon the railroad companies and is an Act which has been liberally construed by the courts, and yet a violation of the Safety Appliance Act will not justify a verdict in favor of an injured employee unless the violation of that Act is the proximate cause of the accident which results in his injury.

Davis vs. Wolfe, 263 U.S. 239;

See also:

St. Louis & S. F. R. Co., vs. Conarty, 238 U.S. 243.

In the case at Bar the actions of the Indians in either causing the truck to stall on the track or in failing to observe the approaching train before reaching the track definitely and absolutely prevented the Railroad Company from performing its duty under the law or the bond; that is to say, to avoid

injuries or death. Their actions made it impossible for the Railroad Company to operate without causing the injuries or death. Nothing the Railroad Company did or did not do can be attributed to the collision.

Where nonperformance by one party disables the other from performance on his part, such performance is excused.

17 C.J.S. 910, Sec. 424.

To say that the Railroad Company should respond in damages is so contrary to all law and reason that we can at once conclude that Congress never intended such a result, for if it did words pointing in that direction would most certainly have been inserted in the statute.

“It is not the province of the courts to lay undue emphasis on a particular word in a statute when Congress, which enacted the legislation, failed to do so.”

Brotherhood of R. & S. Clerks, etc., vs. Norfolk S. R. Co., (4th Cir.) 143 Fed. (2d) 1015.

VI.

The verdicts for the deaths of Helen and Ninip Toane can only be supported on the record by evidence of pecuniary loss, for the jury was told by the court that that was the measure of damages. There was no other evidence covering any other element of damage. So far as the death of Helen Toane is concerned, she had contributed “during her lifetime” approximately \$100.00; sometimes Helen bought her mother a shawl and “about every two months sometimes” she bought her mother food (R.122-123). She did not buy \$20.00

worth of groceries every two months; that was qualified by the witness, since, as quoted above, *sometimes* she purchased food every two months.

With reference to the death of Ninip Toane, the only pecuniary loss was not to exceed \$275.00, and there is no other testimony from which the jury could have found that any individual could reasonably have expected pecuniary benefits greater than that, and irrespective of the ruling of the court that loss of companionship could be taken into account, the jury was definitely instructed that they could not do so, and accordingly the verdict of the jury is not based upon any competent evidence in the record, for which reason the trial court should have set these verdicts aside and we think this court should have reversed the judgment of the lower court in failing to do that.

Under the Federal Employers Liability Act (45 U.S.C.A. 51) the statute authorizes damages the same as does the law herein involved, and yet the United States Supreme Court has definitely held that pecuniary loss is the measure. See cases cited on page 34 of our opening brief.

This action is not based upon the Idaho death statute, which is broader with reference to the recovery of damages than is either the Federal Employers Liability Act or the statute involved herein, and no good reason appears why rulings under the Idaho statute should control rather than the decisions of the United States Supreme Court in construing a federal statute similar to the one involved here. This principle will be further discussed in the next point.

Finally, with reference to this assignment, there is not even a scintilla of evidence to support these verdicts.

A mere scintilla of evidence is not enough to require the submission of an issue to the jury.

Gunning vs. Cooley, 281 U.S. 90, 74 L.Ed. 720;

Chicago, M. St. P. R. Co., vs. Coogan, 271 U.S. 472, 70 L.Ed. 1041.

VII.

This point relates to funeral expenses and is closely allied with point VI just discussed. The court says:

“There is nothing in the Act to militate against such recovery and there is much general authority favorable to the recovery of legitimate outlays of this nature. cf Jutila v. Frye, 9 Cir., 8 F. 2d 608, 609; Hartman v. Gas Dome Oil Co., 50 Idaho 288.”

There is nothing in the Act, to-wit: Section 14, which states that such expenses are recoverable, and under the Federal Employers Liability Act, which is similar in scope with reference to damages, the Federal Courts have held that funeral expenses are not recoverable. See authorities cited on page 39 of our opening brief.

From a legal standpoint there is no right given to the plaintiff to invoke the Idaho statute with reference to wrongful death and damages authorized thereunder, for here the court has in effect said in its first decision, 113 Fed. (2d) 212, that the statute does create an action for death. That being the case Congress then has taken over the entire field to the

complete and absolute exclusion of all of the state laws which attempt to cover the same field.

La. & Ark. RR Co., vs. Pratt (5th Cir.) 142 Fed.
(2d) 847, 848.

And the Supreme Court cases cited therein.

Therefore, we seriously contend that the court erred in holding on authorities construing the Idaho statute that funeral expenses may be recovered.

VIII.

This assignment relates to the court's holding that loss of companionship is an element of damage under the Federal statute here involved. What has been said in Points VI and VII apply equally to this assignment and under the ruling of this court that the statute in effect creates a right of action for death and under the federal authorities with reference to the exclusiveness of the Acts of Congress in a particular field we find no authority which would authorize the invoking of the Idaho Statute and the decisions rendered thereunder. For the reasons mentioned the verdicts for the deaths of these two Indians cannot be "judged by ordinary standards" and there accordingly was no evidence by which the jury could find a verdict in the amounts it did and the court sustain such verdicts, for which reason we respectfully submit that this court should have reversed the judgment as to this phase of the case if for no other reason. It is not so much a question of the jury having acted under the influence of passion and prejudice, as it is a question of finding a verdict upon no evidence at all. We submit that the court's instruction was correct, but, right

or wrong, the jury was duty bound to follow it. They did not do so.

CONCLUSION

Accordingly we respectfully urge that appellants' petition for rehearing be granted and that the judgment of the District Court for the District of Idaho, Eastern Division, be, upon further consideration, reversed.

Respectfully submitted,

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Appellants

No. 10727

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN R. HALEY, as Administrator of the Estate
of George Salter, deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

MAY 25 1944

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, in and
for the District of Montana, Helena, Division

JOHN R. HALEY, as Administrator of the Estate
of George Salter, Deceased; JOHN SALTER
and PETER SALTER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT-AT-LAW

Come now the plaintiffs above named and for
cause of action against the defendant complain and
allege:

I.

That Ella May Stanton Wood was duly and regularly appointed as administratrix of the estate of George Salter, deceased, by order of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, regularly made and entered therein in the matter of the estate of George Salter, deceased, on the 11th day of August, 1930, and served as said administratrix of said estate from the 11th day of August, 1930 to June 2nd, 1934; that the plaintiff, John R. Haley, is now the duly and regularly appointed, qualified and acting administrator of the estate of George Salter, deceased, appointed by order of the District Court of the Second Judicial District of the State of Montana, in and for the County of

Silver Bow, in the matter of the estate of George Salter, deceased, regularly made and entered therein on the 2nd day of June, 1934; that Letters of Administration were duly and regularly issued to the plaintiff, John R. Haley, by said Court on the 2nd day of June, 1934, and the same have never been [3] revoked and are now in full force and effect, and as such administrator he succeeded Ella May Stanton Wood, who resigned.

II.

That George Salter, deceased, died intestate, a resident of Silver Bow County, Montana, on the 4th day of October, 1918, and his estate is entitled to be distributed under the intestate laws of the State of Montana; that a proceeding was had in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, in the matter of the estate of George Salter, deceased, probate file No. 9105, to determine heirship in said estate under the provisions of the laws of the State of Montana in such cases made and provided; that said Court at said time and place had jurisdiction to make such determination and that in a proceeding duly and regularly filed in said probate Court, which complied with all of the provisions of the laws of the State of Montana in all respects under said laws in said State, and that said Court at said time and place assumed and took jurisdiction to determine the legal heirs of George Salter, deceased, and that on or about the 3rd day of October, 1932, said Court by order

and by decree duly and regularly entered and filed in said Court on said day, the Court having jurisdiction to make such decree, determined and decreed the said John Salter and the said Peter Salter to be brothers of George Salter, deceased, and to be the only heirs at law of said deceased, and as such entitled to inherit the whole of said estate of said George Salter, deceased, under the intestate laws of the State of Montana; that in said proceeding said Court had jurisdiction of the subject matter and of the parties; that attached hereto and by this reference made a part hereof, is plaintiffs' "Exhibit A", which is a certified copy of said proceedings had in said Court, and which includes said decree of said Court determining heirship, as aforesaid; that the said decree of the District Court of the Second Judicial District of the [4] State of Montana, in and for the County of Silver Bow, a certified copy of which is attached hereto and by this reference made a part hereof, as aforesaid, adjudicates and determines the matter of heirship in the estate of George Salter, deceased, and is binding as a matter of law upon the above entitled Court and cannot be collaterally attacked.

III.

That during the process of the administration of the estate of George Salter, deceased, in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, probate file No. 9105, the administratrix of said estate duly and regularly published

notice to creditors; that within the time permitted in said notice and within the time allowed by law, Helma Nicholson, as administratrix of the estate of Mary Johnson, deceased, filed with the administratrix of the estate of George Salter, deceased, her claim, verified by affidavit, claiming said estate of George Salter, deceased, to be indebted to her in the sum of One Thousand Four Hundred Ninety-five and 83/100 Dollars (\$1,495.83); that said Ella May Stanton Wood, administratrix, allowed said claim on the 23rd day of February, 1932, and the Judge of the District Court having jurisdiction of said probate matter allowed said claim in the sum of Seven Hundred Forty-eight and no/100 Dollars (\$748.00) on the 4th day of June, 1932; that within the time permitted in said notice and within the time allowed by law, Mrs. Ella May Stanton Wood filed her claim, verified by affidavit, in said probate matter and said claim was on the 4th day of June, 1932 allowed by the Judge of said probate Court having jurisdiction in said matter in the sum of One Thousand and no/100 Dollars (\$1,000.00); that attached hereto marked "Exhibit B" and "Exhibit C", and by this reference made a part hereof, are certified copies of said claims so allowed, as aforesaid, and that no part of said claims has been paid, and that no part of the costs of administration has [5] been paid, and said estate has no property or money to pay either said claims or the costs of administration.

IV.

That on or about the 27th day of April, 1918, at the City of Butte, County of Silver Bow, State of Montana, George Salter, now deceased, enlisted and was inducted into the armed forces of the defendant, the United States of America, with the grade of private and served under the War Department in the army of the United States in the Infantry Division from said 27th day of April, 1918, until the 4th day of October, 1918, and was, during all of said time, employed in the active military service of the United States, under the direct supervision of its War Department in the war with Germany and her allies; that at the time of his enlistment, April 27th, 1918, the said George Salter, now deceased, was a legal resident of Silver Bow County, Montana.

V.

That on or about May, 1918, the said George Salter, now deceased, made application to the proper officials of the United States for insurance under the provisions of Article IV. of the War Risk Insurance Act of Congress and the regulations of the War Risk Insurance Bureau of the defendant, established by said Act, in the sum of Ten Thousand Dollars (\$10,000.00), but that said George Salter, deceased, never received a certificate of his compliance with the War Risk Insurance Act, but that after making said application for insurance, and during the entire term of George Salter's service under the War Department, as aforesaid, there was deducted from his monthly pay for such

service for the defendant, United States of America, through its proper officials, the monthly premiums upon said War Risk Insurance provided for by said Act and the rules and regulations promulgated thereunder by the War Risk Insurance Bureau and the Director thereof. [6]

VI.

That the said George Salter, deceased, died on the 4th day of October, 1918, while said insurance was in full force and effect, and was killed in action while fighting with the armed forces of the defendant in the American Expeditionary Forces in France; that in his application for insurance, said George Salter, now deceased, named his estate as beneficiary and that said insurance matured after the death of George Salter, deceased, on the 4th day of October, 1918, and on said day became payable to the estate of said George Salter, deceased.

VII.

That by written communication dated March 5th, 1930 Ella May Stanton Wood, claimant in said estate and who was later made administratrix of said estate, as hereinbefore alleged, through her attorney made claim for the benefits of said insurance and which said written communication to Frank T. Hines, Administrator of Veterans' Affairs of the United States, which was received by said Administrator on or about March 9th, 1930, said in part as follows:

“* * * I desire, * * *, to know * * *, if the Bureau would voluntarily pay it (insurance) to

his (George Salter's) administrator. The above information will be greatly appreciated. * * *'

That the Veterans' Administration replied to said written communication in writing without stating whether the insurance would be voluntarily paid to the estate and that again on April 26th, 1930 Ella May Stanton Wood, through her attorney, served another written communication on the Administrator of the Veterans' Administration, which was received by said Administrator on or about April 30th, 1930, and in that communication said attorney used the following language:

“* * * Will the bureau pay the amount due the estate on the insurance policy to the administrator of said deceased's estate, [7]

That said Administrator and said Veterans' Administration replied to said second written communication without stating whether or not said insurance would be paid to said estate, and that not knowing exactly what it took to constitute a denial under the terms of the War Risk Insurance Act, Ella May Stanton, who was later Ella May Stanton Wood by marriage, filed suit in the District Court of the United States, in and for the District of Montana, Helena Division, on or about the 10th day of October, 1930, and in which said administratrix, as plaintiff, alleged that said Administrator had refused to pay said insurance benefits; that said Complaint in said action was amended by plaintiff, and Ella May Stanton Wood resigned as administratrix and John R. Haley was appointed in her stead and that finally

the Judge of the District Court of the United States in said case finally sustained a demurrer to the Fourth Amended Complaint, and judgment in said action was duly and regularly entered dismissing the same on the 4th day of February, 1936; that said action was determined and said judgment entered because of the order of said Court sustaining said demurrer and plaintiffs did not file another amended complaint and that said judgment was not on the merits in said case and was entered in said case for the reason of the indefiniteness of the allegations in said Fourth amended Complaint in alleging a disagreement and that said action failed for reasons other than on its merits; that the first communication received by either of the above entitled plaintiffs, by Ella May Stanton, Ella May Stanton Wood, or John R. Haley, which informed either that the Veterans' Administration of the United States and of the defendant herein, would not pay the benefits of said insurance was in a written communication dated at Washington, D. C. January 19th, 1937, and which communication in an attempt to make legal conclusions and to color the record pretended to quote from all of the correspondence in the file of said case, and finally in the last paragraph of said letter, Frank T. Hines, the Administrator of Vet- [8] erans' Affairs of the United States, wrote to plaintiff, John R. Haley, as administrator of the estate of George Salter, deceased, as follows:

“You are * * * advised, upon the evidence of record in the Veterans' Administration, I am of

the opinion the insurance claimed by said veteran is not payable under the law, and for such reason the claim * * * is denied."

That said letter was received by plaintiff, John R. Haley, through one of his attorney, Warren E. Miller of Washington, D. C., on or about January 20th, 1937, and that the same was furnished to plaintiff, John R. Haley, after he had petitioned the Supreme Court of the District of Columbia for a Writ of Mandamus directed to Frank T. Hines, and upon which petition Frank T. Hines was ordered to appear and show cause why he should not either pay or refuse to pay said insurance; that as heretofore stated, plaintiff, John R. Haley, and his predecessor, Ella May Stanton Wood, represent said estate and the creditors of said estate and through their respective attorneys demanded in writing of Frank T. Hines, Administrator of Veterans' Affairs, beginning with March 9th, 1930 the benefits of said insurance of George Salter, deceased, for his estate; that said claim was denied by Frank T. Hines, Administrator, in writing, in a communication dated January 19th, 1937 and received by plaintiffs' attorneys about January 20th, 1937, and that said demand in writing and denial in writing constitute a disagreement between the plaintiffs, the estate of George Salter, deceased, and the United States of America, and the United States Veterans' Administration, successor to the United States Veterans' Bureau and the Administrator thereof, within the meaning of the War

Risk Insurance Act of Congress and the amendments thereto.

VIII.

That under the provisions of the War Risk Insurance Act and the amendments thereto, the estate of George Salter, de- [9] ceased, is entitled to the payment of the entire benefits of said War Risk Insurance policy because of the death of said insured, such benefits amounting in all to the face value of said policy of Ten Thousand Dollars (\$10,000.00), and there is now due the estate of George Salter, deceased, from the defendant on said insurance, the sum of Ten Thousand Dollars (\$10,000.00).

Wherefore, plaintiffs pray judgment against the defendant for the sum of Ten Thousand Dollars (\$10,000.00) in favor of the estate of George Salter, deceased, to be paid to John R. Haley, as administrator thereof, and that the judgment herein provide for the payment to plaintiffs' attorneys a fee of Ten per cent (10%) of such judgment, and that plaintiffs be awarded such other and further relief as to this Honorable Court seems meet and proper in the premises.

JOHN W. MAHAN,

Attorney for Plaintiffs, Helena, Montana.

[Endorsed]: Filed Feb. 3. 1937. [10]

[Title of District Court and Cause.]

AMENDED COMPLAINT AT LAW

Leave of Court first being had comes now the plaintiff above named and for cause of action against the defendant, complains and alleges:

I.

That Ella May Stanton Wood was duly and regularly appointed as administratrix of the estate of George Salter, deceased, by order of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, regularly made and entered therein in the matter of the estate of George Salter, deceased, on the 11th day of August, 1930, and served as said administratrix of said estate from the 11th day of August, 1930, to June 2nd, 1934; that plaintiff, John R. Haley, is now the duly and regularly appointed, qualified and acting administrator d.b.n. of the estate of George Salter, deceased, appointed by order of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, in the matter of the estate of George Salter, deceased, regularly made and entered therein on the 2nd day of June, 1934; that Letters of Administration were duly and regularly issued to plaintiff, John R. Haley, by said Court on the 2nd day of June, 1934, and the same have never been revoked and are now in full force and effect, and as such administrator he succeeded Ella May Stanton Wood, who resigned. [39]

II.

That George Salter, deceased, died intestate, a resident of Silver Bow County, Montana, on the 4th day of October, 1918, and his estate was and is entitled to be probated under the intestate laws of the State of Montana, and that plaintiff, as before alleged, is the duly and regularly appointed, qualified and acting administrator of said estate.

III.

That during the process of the administration of the estate of George Salter, deceased, in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, probate file No. 9105, the administratrix of said estate duly and regularly published notice to creditors; that within the time permitted in said notice and within the time allowed by law, Hilma Nicholson, as administratrix of the estate of Mary Johnson, deceased, filed with the administratrix of the estate of George Salter, deceased, her claim, verified by affidavit, claiming said estate of George Salter, deceased, to be indebted to her in the sum of One Thousand Four Hundred Ninety-five and 83/100 Dollars (\$1,495.83); that said Ella May Stanton Wood, administratrix, allowed said claim on the 23rd day of February, 1932, and the Judge of the District Court having jurisdiction of said probate matter allowed said claim in the sum of Seven Hundred Forty-eight and no/100 Dollars (\$748.00) on the 4th day of June, 1932; that within the time permitted in said notice and within the time al-

lowed by law, Mrs. Ella May Stanton Wood filed her claim, verified by affidavit, in said probate matter, and said claim was on the 4th day of June, 1932, allowed by the Judge of said probate Court having jurisdiction in said matter, in the sum of One Thousand and no/100 Dollars (\$1,000.00); that attached hereto, marked "Exhibit A." and "Exhibit B". and by this reference made a part hereof are correct copies of said claims so allowed, as aforesaid, and that no part of said claims has been paid, and that no part of the costs of [40] administration has been paid, and said estate has no property or money to pay either said claims or the costs of administration; that on the 17th day of February, 1940, plaintiff, as administrator d.b.n. of said estate, filed an account, report and petition in which said administrator reported the process of the administration of said estate, the money expended therefor, and that there was no money or other assets in said estate to pay the costs of administration or the claims heretofore alleged, and petitioned the Court to fix the fee of the administrator and of the administrator's attorney; that said probate Court on the same date made its order in said estate fixing the time and place for hearing said account, report and petition, and directed that notice thereof be given and at the time and place of said hearing said probate Court, after hearing the testimony of witnesses, made its order allowing the report, settling the account and allowing administrator's and attorney's fees; that marked "Exhibit C.", attached hereto and by this refer-

ence made a part thereof, is a copy of said order; that it will be noted from said order, "Exhibit C.", that the Court allowed expenditures made by said administrator in the administration of said estate in the sum of One Thousand Four Hundred Eight and 81/100 Dollars (\$1,408.81); that the claims in the amount of One Thousand Seven Hundred Forty-eight and no/100 Dollars (\$1,748.00), previously allowed were again approved and in said order said Court found that the same should bear interest at the rate of 6% per annum dating from June 4th, 1932; that the administrator's fee was fixed at \$500.00 and that of his attorney at \$750.00; that the interest on said claims, the principals of which total \$1,748.00, at the rate of 6% per annum, is Eight Hundred Forty-seven and 78/100 Dollars (\$847.78); that the total of the costs of administration, claims and interest and amount now due and owing by said estate to all persons is Four Thousand four and 59/100 Dollars (\$4,004.59), and that there are no assets or other property in said estate to pay any part or the whole thereof. [41]

IV.

That on or about the 27th day of April, 1918, at the City of Butte, County of Silver Bow, State of Montana, George Salter, now deceased, enlisted and was inducted into the armed forces of the defendant, the United States of America, with the grade of private and served under the War Department in the army of the United States in the Infantry Division from said 27th day of April,

1918, until the 4th day of October, 1918, and was, during all of said time, employed in the active military service of the United States, under the direct supervision of its War Department in the war with Germany and her allies; that at the time of his enlistment, April 27th, 1918, the said George Salter, now deceased, was a legal resident of Silver Bow County, Montana.

V.

That on or about May, 1918, the said George Salter, now deceased, made application to the proper officials of the United States for insurance under the provisions of Article IV. of the War Risk Insurance Act of Congress and the regulations of the War Risk Insurance Bureau of the defendant, established by said Act, in the sum of Ten Thousand Dollars (\$10,000.00), but that said George Salter, now deceased, never received a certificate of his compliance with the War Risk Insurance Act, but that after making said application for insurance, and during the entire term of George Salter's service under the War Department, as aforesaid, there was deducted from his monthly pay for such service for the defendant, United States of America, through its proper officials, the monthly premiums upon said War Risk Insurance provided for by said Act and the rules and regulations promulgated thereunder by the War Risk Insurance Bureau and the Director thereof.

VI.

That said George Salter, died on the 4th day of October, 1918, while said insurance was in full force and effect, and [42] was killed in action while fighting with the armed forces of the defendant in the American Expeditionary Forces in France; that in his application for insurance, said George Salter, now deceased, named his estate as beneficiary and that said insurance matured after the death of George Salter, deceased, on the 4th day of October, 1918, and on said day became payable to the estate of George Salter, deceased.

VII.

That by written communication dated March 5th, 1930, Ella May Stanton Wood, claimant in said estate and who was later made administratrix of said estate, as hereinbefore alleged, through her attorney made claim for the benefits of said insurance and which said written communication to Frank T. Hines, Administrator of Veterans' Affairs of the United States, which was received by said Administrator on or about March 9th, 1930, said in part as follows:

“* * * I desire, * * * to know * * * if the Bureau would voluntarily pay it (insurance) to his (George Salter's) administrator. The above information will be greatly appreciated.* * *”.

That the Veterans' Administration replied to said written communication in writing without stating whether the insurance would be voluntarily paid to the estate and that again on April 26th, 1930

Ella May Stanton Wood, through her attorney, served another written communication on the Administrator of the Veterans' Administration, which was received by said Administrator on or about April 30th, 1930, and in that communication said attorney used the following language:

“* * * Will the Bureau pay the amount due the estate on the insurance policy to the administrator of said deceased's estate, * * *”.

That said administrator and said Veterans' Administration replied to said second written communication without stating whether or not said insurance would be paid to said estate, and that not knowing exactly what it took to constitute a denial under the terms of the War Risk Insurance Act, Ella May Stanton, who was later Ella May Stanton Wood [43] by marriage, filed suit in the District Court of the United States, in and for the District of Montana, Helena Division, on or about the 10th day of October, 1930, and in which said administratrix, as plaintiff, alleged that said Administrator had refused to pay said insurance benefits; that said complaint in said action was amended by plaintiff, and Ella May Stanton Wood resigned as Administratrix and John R. Haley was appointed in her stead and that finally the Judge of the District Court of the United States in said case sustained a demurrer to the Fourth Amended Complaint, and judgment in said action was duly and regularly entered dismissing the same on the 4th day of February, 1936; that said action was dismissed and

said judgment entered because of the order of said Court sustaining said demurrer and plaintiffs did not file another amended complaint, and that said judgment was not on the merits in said case and was entered in said case for the reason of the indefiniteness of the allegations in said Fourth Amended Complaint in alleging a disagreement and that said action failed for reasons other than on its merits; that the first communication received by either of the above entitled plaintiffs, Ella May Stanton, Ella May Stanton Wood, or John R. Haley, which informed either that the Veterans' Administration of the United States and of the defendant herein, would not pay the benefits of said insurance was in a written communication dated at Washington, D. C. January 19th, 1937, and which communication, in an attempt to make legal conclusions and to color the record, pretended to quote from all the correspondence in the file of said case, and finally in the last paragraph of said letter, Frank T. Hines, the Administrator of Veterans' Affairs of the United States, wrote to plaintiff, John R. Haley, as administrator of the estate of George Salter, deceased, as follows:

“You are * * * advised, upon the evidence of record in the Veterans' Administration, I am of the opinion the insurance claimed by said veteran is not payable under the law, and for such reason the claim * * * is denied.” [44]

That said letter was received by plaintiff, John R. Haley, through one of his attorneys, Warren E.

Miller of Washington, D. C. on or about January 20th, 1937, and that the same was furnished to plaintiff, John R. Haley, after he had petitioned the Supreme Court of the District of Columbia for a Writ of Mandamus directed to Frank T. Hines, and upon which petition Frank T. Hines was ordered to appear and show cause why he should not either pay or refuse to pay said insurance; that, as heretofore stated, plaintiff, John R. Haley, and his predecessor, Ella May Stanton Wood, represent said estate and the creditors of said estate and through their respective attorneys demanded in writing of Frank T. Hines, Administrator of Veterans' Affairs, beginning with March 9th, 1930, the benefits of said insurance of George Salter, deceased, for his estate; that said claim was denied by Frank T. Hines, Administrator, in writing, in a communication dated January 19th, 1937 and received by plaintiff's attorneys about January 20th, 1937, and that said demand in writing and denial in writing constitute a disagreement between the plaintiffs, the estate of George Salter, deceased, and the United States of America, and the United States Veterans' Administration, successor to the United States Veterans' Bureau and the Administrator thereof, within the meaning of the War Risk Insurance Act of Congress and the amendments thereto.

VIII.

That under the provisions of the War Risk Insurance Act and the amendments thereto, the estate of George Salter, deceased, is entitled to the pay-

ment of Four Thousand Four and 59/100 Dollars (\$4,004.59) as determined by the probate Court, as heretofore alleged, as costs of administration, legal claims allowed and the interest thereon, which is the sum of money the deceased's estate legally owes and which would not escheat under the laws of the State of Montana to the State of the residence of said deceased, and to which said estate is entitled out of the benefits of said War Risk Insurance policy [45] because of the death of said insured, and there is now due the estate of George Salter, deceased, from the defendant, the United States of America, the sum of Four Thousand Four and 59/100 Dollars (\$4,004.59).

Wherefore, plaintiff prays judgment against the defendant for the sum of Four Thousand Four and 59/100 Dollars (\$4004.59) in favor of the estate of George Salter, deceased, to be paid to John R. Haley, as administrator, d.b.n. and that the judgment herein provide for the payment to the plaintiff's attorney a fee of Ten percent (10%) of said judgment, and that plaintiff be awarded such other and further relief as to this Honorable Court seems meet and proper in the premises.

JOHN W. MAHAN,

Attorney for Plaintiff, Helena, Montana.

(Duly Verified.)

[Endorsed]: Filed July 22, 1940. [46]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and for its answer to the amended complaint filed herein admits, denies and alleges, as follows:

I.

For lack of information and belief as to the allegations contained in paragraph I of the complaint, they are denied.

II.

The allegations of paragraph II of the complaint are denied except that it is admitted that George Salter died intestate on the 4th day of October 1918, and further admits and alleges that the said George Salter left no heirs or next of kin who were entitled to distribution of his estate under the laws of the State of Montana.

III.

For lack of information or belief as to the allegations contained in paragraph III of the complaint, they are denied.

IV.

Paragraph IV of the complaint is denied, except that it is admitted that George Salter was inducted into the army on April [53] 25, 1918, and served therein until the 4th day of October 1918 on which day he died intestate.

V.

It is admitted that George Salter applied for and was granted a \$10,000 contract of war risk term insurance on May 6, 1918.

VI.

The allegations of paragraph VI of the complaint are denied, except that it is admitted that George Salter died on October 4, 1918, at which time this insurance was in full force and effect; that in his application for insurance George Salter named himself as beneficiary.

VII.

The allegations contained in paragraph VII are denied.

VIII.

The allegations of paragraph VIII of the complaint are denied.

All allegations of the complaint not specifically admitted, modified or denied are here and now denied.

Second Defense

The defendant moves the court that this action be dismissed upon the ground and for the reason that the amended complaint herein fails to state sufficient facts to constitute a claim against the defendant upon which relief can be granted.

Defendant demands a jury trial of all the issues so triable in this cause.

JOHN B. TANSIL,

United States Attorney.

FRANCIS J. MCGAN,

Attorney, Department of Justice.

[Endorsed]: Filed Aug. 29, 1940. [54]

[Title of District Court and Cause.]

TESTIMONY

The above-entitled case came on for hearing on Friday, November 14, 1941, at Great Falls, Montana, before the Hon. Chas. N. Pray, Judge, sitting without a jury, John W. Mahan, Esq., appearing as counsel on behalf of the plaintiff, and Francis J. McGan, Esq., appearing as counsel on behalf of the defendant, and the following testimony pertinent to the case and proceedings were had:

Mr. McGan: If the Court please, may the record show in this case that both the plaintiff and the defendant waive a trial by jury, reserving each to themselves the right of appeal. Is that right, John?

Mr. Mahan: That is right.

The Court: You may proceed, Mr. Mahan.

Thereupon Mr. Mahan made his opening statement to the Court, followed by a statement by Mr. McGan, which counsel agreed would not be neces-

sary to incorporate in the record, which concluded with this understanding:

Mr. McGan: So, so far as I am advised at this time, there [57] are no heirs of this soldier; he died in service while his insurance policy was in force; so this suit now resolves itself down to a creditors' suit, claims of creditors who put in their bills in 1934, June 2, 1934. One of these creditors is since deceased and the other is living, in Montana some place I understand, and the complaint asks judgment for the amount of these claims only and not for the whole amount of the insurance policy.

Mr. Mahan: And the costs of administration.

Mr. McGan: Well, I mean claims and cost of administration; and that is what this suit is about; it is just over the creditors claims.

PLAINTIFF'S CASE

JOHN W. MAHAN,

sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Testimony

Witness: Ella May Stanton Wood made an application as a creditor under the State Laws of Montana to be appointed administratrix of the Estate of George Salter, Deceased, some time in 1930, and the District Court of Silver Bow County, Montana, on the 11th day of August, 1930, appointed her as the administratrix. Later, Mrs. Wood re-

(Testimony of John W. Mahan.)

signed and John R. Haley was appointed Administrator d.b.n. of the Estate of George Salter, Deceased, by the same Court on June 2, 1934. John R. Haley is still the Administrator d.b.n. of this estate. The Letters have never been revoked and are still in full force and effect. I have—Mr. McGan procured it for me yesterday, marked here for identification “Plaintiff’s Exhibit No. 1”—the copy of the Letters of Administration; [58] I would like to have them admitted in evidence.

The Court: Very well; you agree on that?

Mr. McGan: Yes, your Honor.

PLAINTIFF’S EXHIBIT No. 1

In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.

No. 9105

In the Matter of the Estate of
GEORGE SALTER, Deceased.

Letters of Administration

The State of Montana,
County of Silver Bow—ss.

John R. Haley is hereby appointed Administrator of the Estate of George Salter, deceased.

Witness, F. P. Kelly, Clerk of the District Court of the Second Judicial District of the State of Montana, with the seal thereof affixed, the 2nd day of June, 1934.

(Testimony of John W. Mahan.)

By Order of the Court,

F. P. KELLY,

Clerk.

By D. F. HOLLAND,

Deputy Clerk.

The State of Montana,
County of Silver Bow—ss.

I, John R. Haley, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Montana; and that I will faithfully perform, according to law, the duties of Administrator of the Estate of George Salter, deceased.

JOHN R. HALEY,

Subscribed and sworn to before me the 2nd day of June, 1934. [59]

JOHN W. MAHAN,

Notary Public for the State of Montana, Residing
at Helena, Montana.

My commission expires May 12th, 1936.

Office of the Clerk of the District Court of the
Second Judicial District of the State of Mon-
tana, in and for the County of Silver Bow.—ss.

I, Elmer Shea, Clerk of said Court, do hereby certify the foregoing to be a full, true and correct copy of the Letters of Administration issued to John R. Haley, in the matter of the estate of George Salter, deceased, now on file and of record in my

(Testimony of John W. Mahan.)

office, and I further certify that the same have not been revoked or vacated, but are still in full force and effect.

Witness my hand and the seal of said Court this 13th day of November, A. D., 1941.

ELMER SHEA,

Clerk.

By J. D. FREEBOURN,

Deputy Clerk.

Mr. Mahan: Now I believe Mr. *Mahan* will admit for the defendant that George Salter, the decedent, was inducted into the United States army by the draft in Silver Bow County April 25, 1918, that he served honorably in the army from the 25th day of April, 1918, to October 4, 1918, on which date, that is, the later date, he was killed in action.

Mr. McGan: That is admitted.

Mr. Mahan: I will admit to simplify the case that, so far as the administratrix, or the administrator d.b.n., or the creditors or myself, so far as we know in our contact with this matter for ten years, there are no known relatives.

It is admitted that on May 6, 1918, the decedent George [60] Salter applied for and was granted \$10,000 contract of war term insurance by the United States Government, and that the premiums were paid on the insurance, and the same was in full force and effect on October 4, 1918, when George Salter was killed.

(Testimony of John W. Mahan.)

Mr. McGan: That is admitted in the answer.

Mr. Mahan: Now, upon information and belief and after a lot of investigating, George Salter was a resident of Silver Bow County, Montana, on the date of his induction into the army April 25, 1918. It is admitted in the record that George Salter registered in the draft in Silver Bow County, Montana, and was drafted and inducted into the service from there.

Mr. McGan: That is true.

Mr. Mahan: Showing myself, as a witness, Plaintiff's Exhibit No. 2—marked for identification Plaintiff's Exhibit No. 2: This is a letter which I received, as attorney for the administratrix, through the mail,—or maybe it was the administrator d.b.n.—through the mail on or about November 23, 1935, on a letter head of the Butte Mutual Labor Bureau, from Butte, Montana, and the letter was signed George W. Lentz, Mgr., Butte Mutual Labor Bureau, and I would like to offer that in evidence, if the Court please, as proof of residence.

Mr. McGan: No objection.

The Court: It will be received.

(Testimony of John W. Mahan.)

PLAINTIFF'S EXHIBIT No. 2

Geo. W. Lentz, Manager

F. L. Dervin, Ass't Manager

W. S. Daily, Ass't Manager

Butte Mutual Labor Bureau

Butte, Montana, Nov. 21, 1935.

John W. Mahan, Atty.,

617 Power Bldg.,

Helena, Montana.

Dear Sir:

Your letter of the 20th inst. regarding George Salter received. Beg to advise that the records at A.C.M. Co. employment [61] office shows one Geo. Salter was employed in 1917 and 1918 at the mines as miner. Left service April 1918. On his application he gave Canada as his birthplace.

Very truly

(Signed) GEORGE W. LENTZ Mgr.

Butte Mutual Labor Bureau

Mr. McGan: I will admit there is a disagreement as to the claim herein sued upon; however, the Court understands, I am sure, that I do not admit jurisdiction; I admit they claim this money and it has been denied them.

Mr. Mahan: Mr. McGan, you admit that there is a disagreement so far as the suit is concerned; we made a demand and the administrators denied it,

(Testimony of John W. Mahan.)

and that the action was brought within the time, and as far as that point is concerned you are not claiming the Court does not have jurisdiction from that standpoint?

Mr. McGan: Oh, yes, I am claiming that these people aren't proper parties to this suit at all, that they are not proper parties to make a claim or to get a denial, that the statute is not intended for their benefit; but I am admitting that they made a claim to the Government for benefits under this insurance policy, and that they have a denial of that claim, and that this action, brought on that denial, is brought within the time; so that the Court is not confronted with any question of limitations.

Mr. Mahan: That is all I wanted to prove by these letters.

(Papers marked for identification Plaintiff's Exhibits Nos. 3, 4, and 5, and testimony given in relation thereto; objections were made to their receipt in evidence. Mr. McGan produces from his files and hands to Mr. Mahan a paper, which is marked Plaintiff's Exhibit No. 6.)

Mr. Mahan: I withdraw the offer. Mr. McGan has been kind [62] enough to give me the proof. I withdraw the offer of Exhibits 3, 4 and 5.

Now I show myself Plaintiff's Exhibit 6, marked for identification, and this is a paper given to me by Mr. Francis J. McGan, attorney of the Department of Justice representing the defendant in this case, and it is a copy of notice of death from the Ad-

(Testimony of John W. Mahan.)

Adjutant General's Office, dated December 28, 1918, and it is of George Salter, the decedent in this particular case, and I would like to offer it in evidence.

Mr. McGan: No objection.

Plaintiff's Exhibit No. 6, which is read to the Court, is as follows:

PLAINTIFF'S EXHIBIT No. 6

Treasury Department
Bureau of War Risk Insurance
Form 507

818

Copy of Notice of Death From the
Adjutant General's Office

A. G. O. Dec. 28, 1918

Received: Jan. 3, 1919

Name: Salter, George

Serial No. 2,294,047

Rank: Pvt.

Organization: Co. L. 561st Inf.,

Date of death: Oct. 4, 1918

Cause of death: Killed in action, in line of duty
and not the result of the soldier's
own misconduct.

Emergency address: Mrs. Ella Johnson — Friend,
Care of Broadway Cafe, Butte,
Mont.

CC 311-3-2

For original see: C87775

per

H. C. BRUMBAUGH

The Adjutant General.

(Testimony of John W. Mahan.)

Mr. Mahan: Now, in the administration of the estate I had occasion to, and did, for a period of three or four years [63] beginning with 1930, make a search for property which might belong to George Salter, deceased; in fact, I was with the Administratrix in all of her investigations concerning property, and the only property, if it is property, in the estate of George Salter, deceased, is this claim: Showing myself Plaintiff's Exhibit marked for identification No. 7: this is a creditor's claim; it is alleged in the Complaint as Exhibit A, and I would like to offer in evidence this Exhibit, which is an exact copy of the original, and I take it that Mr. McGan is not going to object to it on the ground that it is not an original, for the reason he was going to bring the originals over yesterday and through a mistake of his secretary we didn't get the file.

Mr. McGan: I wish to object to the introduction of this claim, Exhibit No. 7, in evidence, on the ground and for the reason that it could have no bearing on the issue in this case; it is immaterial and incompetent; that the United States District Court for the District of Montana, in the case wherein this same claim was in issue, has held that the action or decree of a State court in probate can have no bearing on this suit and that it does not bind this Court. On the further ground the Government Statutes provide, your Honor, that the insurance herein sued upon is not subject to the claims of creditors, and I have here, your Honor, and I wish to read that

(Testimony of John W. Mahan.)

statute: "Payments of benefits due or to become due shall not be assignable, and such payments made to or on account of a beneficiary under any of the laws relating to veterans shall be exempt from taxation, exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatsoever either before or after receipt by the beneficiary. Such provisions shall not attach to the claims of the United States arising under such laws, nor shall exemption herein contained as to taxation extend to any property purchased in part or [64] whole out of such payments." I object to its introduction on the further ground, your Honor, that this money due under this insurance policy will escheat to the United States; if it were paid into this estate it will escheat to the State, under the laws of the State of Montana this insurance would escheat to the State because there are no known heirs to take this money. One statute provides it is not subject to the claim of creditors, the other states it would escheat. Judge Bourquin ruled it was not bound by the decree of probate. So I object to the introduction of this claim in evidence on all those grounds.

Mr. Mahan: If the Court please, there are only two claims; I have another one.

The Court: Offer the other one. I will receive the exhibits subject to the objection.

Mr. Mahan: Plaintiff's Exhibit 8 is the same thing, and that is offered.

The Court: And Mr. McGan's objection will apply to it.

(Testimony of John W. Mahan.)

PLAINTIFF'S EXHIBIT No. 7

In the District Court of the Second Judicial District
of the State of Montana, County of Silver Bow

No. 9105

In the Matter of the Estate of
GEORGE SALTER, Deceased.

CREDITOR'S CLAIM

The undersigned, creditor of the estate of George Salter, deceased, presents her claim against the estate of said deceased, with the necessary vouchers, for approval, as follows, to-wit:

Estate of George Salter, deceased,
To Hilma Nicholson, as Administratrix of the
Estate of Mary Johnson, deceased.

19 . .	\$
To ten months' board and lodging, laundry, etc., between June 1st, 1917, and May 1st, 1918, at the rate of \$75.00 per month	750.00
Interest upon said amount is claimed from May 1st, 1918, the same amount- ing at the [65] date hereof, to the sum of	745.83
Total	\$1495.83

(Testimony of John W. Mahan.)

State of Montana

County of Lewis and Clark—ss.

Hilma Nicholson, Administratrix of the Estate of Mary Johnson, Deceased, whose foregoing claim is herewith presented to the administrator of the estate of said deceased, being duly sworn, says that the amount thereof to-wit, the sum of Fourteen Hundred and Ninety-five Dollars and 83/100 (\$1495.83) is justly due to said claimant; that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of said claimant.

HILMA NICHOLSON

Subscribed and sworn to before me this 13th day of October, 1930.

[Seal]

C. E. PEW

Notary Public for the State of Montana. Residing at Helena, Montana. My commission expires September 30th 1932.

(Endorsed)

District Court

County of Silver Bow

In the Matter of the Estate of

GEORGE SALTER, Deceased.

CLAIM OF

Hilma Nicholson, as administratrix of the estate of Mary Johnson, deceased.

For \$1495.83

(Testimony of John W. Mahan.)

The within claim presented to Administratrix of the estate of said deceased is allowed and approved for \$1495.83 this 23rd day of February, 1932.

ELLA MAY STANTON WOOD.
Administratrix.

Allowed and approved for \$748.00 this 4th day of June, 1932.

JEREMIAH J. LYNCH,
Judge. [66]

PLAINTIFF'S EXHIBIT No. 8

In the District Court of the Second Judicial District of the State of Montana, County of Silver Bow.

No. 9105

In the Matter of the Estate of
GEORGE SALTER, Deceased

CREDITOR'S CLAIM

The undersigned, creditor of George Salter, deceased, presents her claim against the Estate of said deceased, with the necessary vouchers, for approval, as follows, to-wit:

Estate of George Salter, deceased,
To Ella May Wood, Dr.

(Testimony of John W. Mahan.)

19 . .	\$
Money loaned George Salter between February 1, 1917, and April 25, 1918..	300
Interest on \$300 at 8% per annum from May 1, 1918, to March 1, 1932..	332
For nursing and care of George Salter for 180 days at \$5.00 per day between February 1, 1917, to October, 1917....	900
Interest on \$900 at 8% per annum from May 1, 1918 to March 1, 1932....	996
<hr/>	
Total	\$2528.—

State of Montana

County of Lewis and Clark—ss.

Ella May Wood whose foregoing claim is herewith presented to the Court for jurisdiction of probate of estate of George Salter, deceased, being duly sworn, says that the amount thereof to-wit, the sum of Twenty-five Hundred Twenty-Eight Dollars (\$2528.00) is justly due to said claimant; that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of said claimant.

ELLA MAY WOOD

Subscribed and sworn to before me this 1st day of March, 1932. [67]

[Seal]

JOHN W. MAHAN

Notary Public for the State of Montana Residing
at Helena, Montana. My Commission expires
May 12th, 1933.

(Testimony of John W. Mahan.)

(Endorsements)

District Court

County of Silver Bow

In the Matter of the Estate of

GEORGE SALTER, Deceased.

CLAIM OF

Ella May Wood

For \$2528.00

The within claim presented to
of said deceased is allowed and approved for \$.
this day of, 193..

Claim of the administratrix herein.

Allowed and approved for \$1000.00 this 4th day
of June, 1932.

JEREMIAH J. LYNCH

Judge.

Mr. Mahan: Testifying as a witness, I have in my hand Plaintiff's Exhibit marked for identification No. 9, and this is a certified copy by the Clerk of the District Court of Silver Bow County, Montana, in the matter of the Estate of George Salter, deceased, of an order of that Court, order allowing report, settling account, and allowing administrators' and attorney's fees. In connection with this, I prepared the petition setting forth the figures in the accounting, and the only thing in the accounting

(Testimony of John W. Mahan.)

were the costs which actually had been expended and most of which I paid. This was set for hearing, and the Court fixed the attorney's fees, fixed the administrator's fees, and we put a recapitulation in of all of these claims, that is, these two claims Exhibits 7 and 8, [68] which makes up the whole case here; and I would like to offer this certified copy of this order in evidence for the same purpose that the claims were admitted.

Mr. McGan: I would like to have my other objection considered also an objection to this, and I have one other point to make: This order recites that a copy of a notice of hearing on this order was sent to John B. Tansil, United States Attorney for the District of Montana. That is true; I got it; I have it with me. That order said that we were to appear over there on the 2nd day of March. I went over there on the 2nd day of March to appear at this hearing, not because I was going to make any objection, but I wanted to go to see what was going to happen. I wasn't going to submit to jurisdiction of the State Court on a claim where we were not made parties. I went over there, and the claim didn't come on for hearing; nobody showed up, and I went back that noon when the Court recessed, and I heard no more of it; and the order here states on the 16th day of March this was entered. So I want the Court to know we didn't have any notice of hearing on this petition on the day it was heard.

Mr. Mahan: I am not admitting anything of the sort.

(Testimony of John W. Mahan.)

Mr. McGan: Then I will have one more objection to this: that it is not properly identified; it is just a blunt certified copy of the record and could have no bearing here.

Mr. Mahan: In other words, you are objecting because it is a copy?

Mr. McGan: I am objecting because it is a copy.

Mr. Mahan: I know what you are doing that for. If you will hear the balance of my testimony; I am under oath.

Mr. McGan: The purpose is so we could get the man and bring the whole record over and I could cross examine him.

Mr. Mahan: I don't think it is very material whether you were there or not, but I do know the United States Attorney was notified; I prepared the notice and went in to the Clerk and had it sent out. The date of the hearing was continued at my instance, and whether or not they notified counsel of the date to which it had been continued I have no knowledge, and [69] as far as I am concerned I am willing to take his word for it, but I do know the United States Attorney was notified of the hearing.

Mr. McGan: Do I understand you will admit that the United States Attorney had notice of this hearing of March 2 and you will admit I went over there to that hearing, and I didn't receive any other notice of any other hearing, neither did Mr. Tansil?

Mr. Mahan: You can testify to that fact. I will state I have no knowledge; but you agreed to let that

(Testimony of John W. Mahan.)

certified copy go in, and that was a gentleman's agreement between you and me yesterday.

Mr. McGan: Oh, well, John, I told you about this thing yesterday.

Mr. Mahan: You told me you would agree to let this in evidence.

Mr. McGan: Yes, sir, on a certain condition.

Mr. Mahan: And I asked you to bring the probate file over.

Mr. McGan: I have it right here.

Mr. Mahan: Let's put that original in.

Mr. McGan: No, this belongs to the Clerk in Butte.

Mr. Mahan: I don't know if you were at that second hearing; I have nothing to refute your testimony—. I will admit, as far as I am concerned, Francis J. McGan did not know anything about the date to which this hearing on which the petition to determine attorney's fees and administrator's fees was determined.

Mr. McGan: You wouldn't go one step further and say——

Mr. Mahan: I wish to offer Plaintiff's Exhibit No. 9, which is a certified copy of the order of the District Court in this matter.

Mr. McGan: We have the same objection to it as we have to Exhibits 7 and 8.

The Court: Let it be received subject to that objection. [70]

Mr. Mahan: Going ahead with my testimony for the record, As I stated, at the hearing on the claims

(Testimony of John W. Mahan.)

—now, the claim of Nicholson—administratrix of the Estate of Mary Johnson—who is now deceased, at the hearing held by Judge Lynch on that, the claim was reduced from \$1495.83 down to \$748.00; and at the hearing on Mrs. Ella May Stanton Wood, who was the original administratrix here, on her claim, and she made her claim for \$2528, and at the hearing by Judge Lynch on that it was reduced to \$1000.00; and the point I am making in that regard is that Judge Lynch went into the matter very thoroughly and exhaustively. I want to testify also with reference to the executor's fee which Judge Downey fixed at the hearing which Mr. McGan failed to attend, his fee was fixed at \$500.00 and the attorney's fee at \$750.00, and I have been the attorney all the way through, and I was the only witness who testified; and in taking those depositions in Ireland I had correspondence for a period of ten years and over, and I had all these letters here in which the solicitors of the Veterans' Bureau had been telling me what the law was and legal effect of this, and I had with me a petition—before we could get any place in court here I had to go to Washington, D. C., to even get a letter. The Department of Justice was very fair, but the Veterans' Administration has been an uphill climb. And these were fixed on the basis of work done, and they were fixed by Judge Downey without any instructions or suggestions from me. Now on this Order, the items of the cost of administration, fee for filing Petition for Letters, \$5.00; publication, notice to creditors,

(Testimony of John W. Mahan.)

\$5.80; and I will testify on that Notice to Creditors was given as required by Montana State Statute, published, and that within the time given in the notice these claims were filed properly with the administratrix and with the Court, and no other claims were filed. Then you will notice in this order here, Premium on surety bond of administratrix, \$120.01; you know when we filed our petition for Letters of Administration we gave a \$10,000 surety bond when we filed it, put up some \$67.00, because Mr. Evans said if [71] we would do that he would pay it, and we did it that way, and altogether we paid \$120.01; then otherwise they are just for costs; and receipts and vouchers were filed for each and everything in here with the exception of attorney's fees and executor's fee, and I know that of my own knowledge and was the only witness who testified there. Now, the sum total of *the and* costs of administration in this suit are \$4004.59 we want paid to this estate out of this \$10,000 policy.

I believe that is all; that is all my testimony.

Mr. McGan: Can I cross examine you?

Mr. Mahan: Why, sure.

(Before transcribing the cross examination, plaintiff's Exhibit No. 9 is here inserted.)

(Testimony of John W. Mahan.)

PLAINTIFF'S EXHIBIT No. 9

In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow

No. 9105

In the Matter of the Estate of

GEORGE SALTER, Deceased.

ORDER ALLOWING REPORT, SETTLING AC-
COUNT, AND ALLOWING ADMINISTRA-
TORS' AND ATTORNEY'S FEES.

This matter coming on regularly to be heard upon the verified report, account and petition of John R. Haley, administrator d.b.n. of the estate of George Salter, deceased; petitioner being represented by his counsel, John W. Mahan, Esq. attorney at law, of Helena, Montana; and it appearing to the above Court that due and legal notice of the time and place of the hearing has been given by the Clerk of this Court by the posting thereof in three of the most public places in Silver Bow County, Montana, at least ten (10) days before the day of said hearing, and by the mailing of a copy of said notice of hearing to John B. Tansil, United States Attorney for the District of Montana, Federal Building, Butte, Montana, [72] at least ten (10) days before the date of said hearing; the Court hereby finds that due and legal notice of this hearing has been given as required by law; and the matter having been heard

(Testimony of John W. Mahan.)

and witnesses having been sworn and having testified in support thereof and the matter being submitted to the Court, and the Court being fully advised in the premises, and it appearing to the Court therefrom that said report is true and said account is correct, and that the same should be settled and allowed, and that said administrator d.b.n. and the original administratrix in said estate retained John W. Mahan, Esq., for the purpose of handling all of the legal matters connected with the administration of said estate, and that said administratrix and said administrator d.b.n. and their attorney are each entitled to a reasonable fee for their said services in said estate:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: That said report be, and the same is hereby approved, and that the said account be and the same is hereby settled and allowed.

It Is Further Ordered, Adjudged and Decreed: That said administratrix and said administrator d.b.n. be and they are hereby allowed a fee for their services as such in the amount of \$500.00, and that John W. Mahan, Esq., is hereby allowed as an attorney's fee in the administration of said estate the sum of \$750.00.

It Is Further Ordered, Adjudged and Decreed: That said administrator d.b.n. be and he is hereby authorized and directed to pay out of any assets in said estate the following:

(Testimony of John W. Mahan.)

Fee for filing Petition for Letters	\$ 5.00
Publication, Notice to Creditors	5.80
Premiums on surety bond of administratrix	120.01
Clerk of District Court, certification of papers	4.50
Joseph V. Flaherty, services, typing papers	8.50
Lois Redlich, services, typing papers . .	5.00
Fee, filing petition Supreme Court, District of Columbia, for writ of mandate	10.00
To John W. Mahan, Esq. for his services as an attorney's fee	750.00
To the administratrix and administrator d.b.n. for the usual and ordinary services and for extraordinary services in the administration of said estate, the sum of	500.00
To Ella May Stanton Wood, the principal amount of her claim heretofore allowed by this [73] Court, the sum of	1000.00
Together with interest thereon at the rate of 6% per annum dating from June 4th, 1932 until the same is paid.	
To Hilma Nicholson, administratrix of the estate of Mary Johnson, deceased, on her claim heretofore allowed by this Court the principal sum of	748.00
Together with interest thereon at the rate of 6% per annum dating from June 4th, 1932 until the same is paid.	

(Testimony of John W. Mahan.)

It Is Further Ordered, Adjudged and Decreed: That each and every act of said administrator d.b.n. as reported be, and the same is hereby approved and ratified.

Dated this 16th day of March, 1940.

T. E. DOWNEY

District Judge

(Certificate of Attestation certifying that the foregoing is a full, true and correct copy in probate Matter No. 9105, in the matter of *George Slater*, Deceased. Dated March 16, 1940, and signed by Elmer Shea, Clerk, by D. F. Holland, Deputy Clerk, and seal of court affixed.)

Cross Examination

By Mr. McGan:

Q. I notice item here, Mr. Mahan, for the Administratrix and administrator de bonis non, ordinary services and extraordinary services, \$500.00; what were those extraordinary services?

A. Of the administratrix and the administrator de bonis non, well, under the Montana Statutes—

Q. No, I am asking you.

A. I am telling you.

Q. I know about that. Tell me what the services were.

A. The legal representative of George Salter, deceased, appointed by the District Court in Silver Bow County, Montana, in 1930, and with the admin-

(Testimony of John W. Mahan.)

istratrix that service continuing, she was a resident of Helena but went to Butte for the reason that Salter was a resident of Butte when he died, and she went over there to give the Court jurisdiction, and each appearance that she made she went over, I hauled her over several times, beginning ten years ago, roads weren't very good, we used to go over, her husband and myself, we usually [74] went over the night before, stay over, go into court at none thirty the next morning, and she served approximately that way for four years, and everything that was done she did and she took the responsibility, with the exception of what I did as her legal representative.

Q. She had the responsibility for what money in the estate?

A. She gave a surety bond for ten thousand dollars and never had a dime in the estate.

Q. Did she have any responsibility for any property at all?

A. We never found any property, other than this money, but we had a tremendous—well, I might say we were figuring there for a couple of years we were going to have this money at any time, and our battle, if you want to call it a battle, our controversy, was with the Veterans' Bureau first and Veterans' Administration, for four years, until Haley was appointed, and Haley has continued for the past six years; and the five hundred dollars is for both of them; and you will notice there is no expense account there either, traveling around for the estate or

(Testimony of John W. Mahan.)

stationery or stamps or telegrams or anything else, there isn't any expense account charged against the estate at all for the administratrix or the administrator, which could be a very considerable sum if it were added up.

Q. I will show you what has been marked as Plaintiff's Exhibit No. 2. A. Yes, sir.

Q. That is the letter you received from the Mutual Labor Bureau. A. Yes, sir.

Q. Mr. Mahan, that states he worked from 1917 as a miner until 1918, and that he left in April. Do you know when he started in 1917?

A. I have no knowledge, even by information, as to any exact date in 1917 that he went to work for the A. C. M. Co., but I do know he was over in Butte about a year or over before he was inducted in the army April 25, 1918; that is my information. [75]

Q. Is it your information that he worked for the A. C. M. Company while he was there?

A. No; my information is that he worked for the Great Northern Railway and fired out of Butte for a while, presumably before he went to work for the A. C. M. Company.

Q. I mean after he did go to work for them, he worked for them to the exclusion of other people until he quit and went to war?

A. That is my understanding, that is my information, that when he went to work for the A. C. M. Company he was on call over there and they were very busy over there.

(Testimony of John W. Mahan.)

Mr. McGan: That is all, your Honor.

Mr. Mahan: My information is that George Salter was living in Great Falls for some months or so and moved over to Butte and was in Butte about a year before he was drafted on April 25, 1918.

With the consent of counsel—I don't want to introduce this big record in evidence—Will you admit what I am now reading is from the original record?

Mr. McGan: I don't think you can read his handwriting. Let me give you a copy.

(That seems to have ended that phase, whatever it was.)

Mr. Mahan: I would like at this time to just briefly, say ten minutes, give our position to the Court, and then let counsel give his position, and would like to have a few days to submit a memorandum on the points involved in the law.

Mr. McGan: If the Court please, I think the law is so plain in this case, that the law is just so plain that there can only be—I don't mean to say there can only be one interpretation, but I think the Court can make up his mind very quickly.

The Court: Would you rather submit it in black and white?

Mr. Mahan: I would rather submit a memorandum. &c. &c. I think we can do it in a little memorandum and present it to the Court very clearly.

[76]

The Court: Probably that would be just as well. I wouldn't want to decide the case on my impres-

(Testimony of John W. Mahan.)

sion until I had given it some consideration, and I would like to have a memorandum, citation of authorities, in think, in the usual way. Memorandum, serve on Mr. McGan a copy, and let him answer, and if you have some replies to make, do that.

Mr. Mahan: Thank you.

The Court: That is the ordinary way, and if you have statutes to cite I would like to have them before me and read them. And then the question would be the time.

Mr. Mahan: Today is the 14th. I would like to have——

The Court: Take all the time you need.

Mr. McGan: Well, thirty days a side?

The Court: Yes.

Mr. McGan: After we receive the transcript? I think we should have a transcript of the testimony.

The Court: Yes, thirty days after you receive the transcript, Mr. Mahan will have, and Mr. McGan will have thirty days, and have fifteen days for reply.

Mr. McGan: I would like to have the reporter copy into the transcript all the papers, and send me a letter tomorrow telling me how much it will be.

I move for judgment——

Mr. Mahan: Each side is moving for judgment. Shall we submit proposed Findings of Fact and Conclusions of Law?

The Court: Yes, you may do that.

(Testimony of John W. Mahan.)

Mr. McGan: Comes now the defendant and asks the Court for judgment, on the ground and for the reason, first, that the Court is without jurisdiction to hear and determine this case, in that there are no proper parties before the Court. Second, that the complaint in this case fails to state a claim upon which relief can be granted. Third, that this insurance money, if it is due, is not payable in this case, because it would escheat, under Section 451, Title 38, U.S.C.A. Next, on the further ground and for the reason that this [77] insurance money is not subject to the claims of creditors, as provided by section 454, title 38, U.S.C.A.

Mr. Mahan: On motion for judgment, I assume the Court will take it under advisement?

The Court: Yes, they are both taken under advisement.

Clerk Garlow: Can Mr. Crowther have an order to withdraw the exhibits.

The Court: Yes.

[Endorsed]: Filed Nov. 19, 1941. [78]

And Thereafter, upon motion of counsel for defendant, trial of said cause was reopened, as more particularly appears from the Minutes of this Court, which are in words and figures as follows, to-wit:

No. 199, John R. Haley, as Admr., etc., vs. United States.

At this time Mr. John W. Mahan appeared for the plaintiff, and Mr. Francis J. McGan appeared for the defendant, United States.

Thereupon counsel for defendant moved the court to reopen the trial of the case for the sole purpose of offering in evidence the Judgment Roll in cause #1429, entitled: John R. Haley, as Administrator of the Estate of George Salter, Deceased; John Salter, and Peter Salter, Plaintiffs vs. United States of America, being a cause filed in the Helena Division of this court.

Thereupon Mr. Mahan stated that the plaintiff agrees to have the case reopened for that specific purpose only.

Thereupon Mr. McGan offered in evidence the aforesaid judgment roll #1429, which was marked for identification as Defendant's Exhibit 10.

Thereupon Mr. Mahan, counsel for Plaintiff, made and filed certain objections to the admission of said defendant's Exhibit Number 10, whereupon the court received said Exhibit Number 10 in evidence, subject to said objections.

Thereupon at the request of Mr. McGan, court ordered that said Defendant's Exhibit #10 may be transmitted to the Clerk at Butte, and the Clerk at Helena, for use of respective counsel in the case.

Thereupon Mr. Mahan was granted thirty days to file a brief after receipt of copy of transcript, and Mr. McGan granted 30 days to file his brief

after receipt of Plaintiff's Brief, and Mr. Mahan granted 15 days thereafter, for reply brief if so advised. [79]

The objections of counsel for the plaintiff to the admission in evidence of defendant's Exhibit No. 10, which were signed and filed, are in words and figures as follows, to-wit:

I object on the part of the plaintiff to the receipt of this Judgment Roll in evidence, upon the grounds following:

(1) That the defendant did not plead it in the answer and that neither the same nor any part thereof serves to prove or disprove any of the issues framed by the pleadings in this case;

(2) That this Judgment Roll is in a case in which the administrator of the estate of George Salter, deceased, John Salter, and Peter Salter are plaintiffs, while in the instant case only the administrator is plaintiff; that is, the same parties are not involved in each action;

(3) That in the case, Cause No. 1429, the action was brought to recover the full amount of the war risk term insurance of George Salter, the death benefits thereof, while this case is to recover only money owed by George Salter;

(4) That the other case, Cause No. 1429, went to judgment, but not on its merits, and under the federal statutes one of these cases terminated for any other reason than on its merits may be re-filed within a period of one year after termination by judgment in the first case; and

(5) That the same is immaterial, irrelevant and redundant, and will serve only to encumber the record.

(Signed) JOHN W. MAHAN,
Attorney for Plaintiff. [80]

DEFENDANT'S EXHIBIT No. 10

Said exhibit being a Judgment Roll in the case No. 1429, entitled John R. Haley, as Administrator of the Estate of George Salter, Deceased, John Salter, and Peter Salter, Plaintiffs, versus United States of America, Defendant, which was received in evidence subject to plaintiff's objection, is in words and figures as follows, to-wit: [81]

In the District Court of the United States for the
District of Montana, Helena Division

ELLA MAY STANTON, As Administratrix of
the Estate of George Salter, Deceased,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT AT LAW

Comes now the plaintiff above named and for cause of action against the defendant, complains and alleges:

I.

That the plaintiff, Ella May Stanton was appointed as administratrix of the Estate of George

Defendant's Exhibit No. 10—(Continued)

Salter, Deceased, by the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, on the 11th day of August, 1930, by order of said court regularly made and entered therein, and has been since and is now the regularly appointed, qualified and acting administratrix of the Estate of George Salter, Deceased.

II.

That on or about the 27th day of April, 1918, at the City of Butte, County of Silver Bow, State of Montana, George Salter, Deceased, enlisted and was inducted into the armed forces of the defendant, the United States of America, with the grade of Private, and served under the War Department in the Army of the United States with said grade of Private in the Infantry Division from the said 27th day of April, 1918 until the 4th day of October, 1918, and was during all of said times employed in the active military service of the United States under the direct supervision [82] of its War Department in the War with Germany and her Allies.

III.

That on or about May, 1918, the said George Salter, Deceased, made application to the proper officers of the United States for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress and the regulations of the War Risk Insurance Bureau of the defendant established by said Act, in the sum of \$10,000 but that said George Salter, Deceased, never received a cer-

Defendant's Exhibit No. 10—(Continued)
tificate of his compliance with the War Risk Insurance Act but that after making said application for insurance and during the entire term of plaintiff's service under the War Department as aforesaid, there was deducted from his monthly pay for such service for the defendant, United States of America, through its proper officers, the monthly premiums upon said War Risk Insurance provided for by said Act and the rules and regulations promulgated thereunder by the War Risk Insurance Bureau and the Director thereof.

IV.

That the said George Salter, Deceased, died on the 4th day of October, 1918, while said insurance was in full force and effect and was killed in action while fighting with the armed forces of the defendant with the American Expeditionary Forces in France; that no beneficiary or beneficiaries within the class permitted by the said War Risk Insurance Act or other acts relating thereto, was named by the said George Salter, Deceased, and that under the law the said insurance matured and was and is payable to the estate of said deceased.

V.

That prior to the commencement of this action the said Ella May Stanton made demand upon the United States of [83] America and upon the United States Veterans Bureau and the Director thereof, for the benefits of said insurance and for the monthly payments due under the provisions of said War

Defendant's Exhibit No. 10—(Continued)

Risk Insurance Act and the insurance so applied for by the said George Salter, Deceased, for the death benefits of the said insurance; that the plaintiff demanded that the defendant pay said benefits voluntarily and the said defendant and the said Bureau and the Director thereof, have denied the claim of plaintiff to the benefits of said War Risk Insurance Act and of the insurance so applied for under said Act by the said George Salter, Deceased, and has refused, and still continues to refuse to grant plaintiff such benefits and pay them into the Estate of George Salter, Deceased, and has refused to make such payments and there now exists a disagreement between the plaintiff and the said defendant, United States of America, and the said United States Veterans Bureau and the Director thereof, within the meaning of the War Risk Insurance Act of Congress and the amendments thereof.

VI.

That under the provisions of the War Risk Insurance Act and the amendments thereof, plaintiff is entitled to the payment of \$57.50 for every month since October 4, 1918 to the date of the filing of this complaint, such payments amounting in all to the sum of \$8,222.50.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$8,222.50; that the judgment herein provide for the payment of plaintiff's attorney's fee of 10% of such judgment and for the payment to said attorney of 10% of all future

Defendant's Exhibit No. 10—(Continued)
payments made under said insurance and that plaintiff be awarded such other and further relief as to this Honorable Court may seem meet and proper in the premises.

(Signed) JOHN W. MAHAN,
Attorney for Plaintiff.

(Verified) [84]

[Title of District Court and Cause.]

AMENDED COMPLAINT AT LAW

Come now the plaintiffs above named and for cause of action against the defendant complain and allege:

I.

That the plaintiff, Ella May Stanton Wood, is the duly and regularly appointed, qualified and acting administratrix of the estate of George Salter, deceased, appointed by order of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, regularly made and entered herein on the 11th day of August, 1930, and ever since has been, and now is the duly and regularly appointed, qualified and acting administratrix of the said estate.

II.

That on or about the 3rd day of October, A.D. 1932, the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, by order and decree regularly made and entered in said Court on said day, determined

Defendant's Exhibit No. 10—(Continued)

the said John Salter and the said Peter Salter to be the brothers of George Salter, deceased, and to be the only heirs at law of said deceased, and entitled to inherit the whole of the estate of said George Salter, deceased, under the intestate laws of the [97] State of Montana; that attached hereto and by this reference made a part hereof, is plaintiff's "Exhibit A", which is a certified copy of the proceedings had in said court and which includes said decree of said court determining heirship, as aforesaid.

III.

That on or about the 27th day of April, 1918, at the City of Butte, County of Silver Bow, State of Montana, George Salter, now deceased, enlisted and was inducted into the armed forces of the defendant, the United States of America, with the grade of private and served under the War Department in the army of the United States with the grade of private in the Infantry Division from the said 27th day of April, 1918, until the 4th day of October, 1918, and was, during all of said time, employed in the active military service of the United States under the direct supervision of its War Department in the war with Germany and her allies.

IV.

That on or about May, 1918, the said George Salter, now deceased, made application to the proper

Defendant's Exhibit No. 10—(Continued)

officers of the United States for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress and the regulations of the War Risk Insurance Bureau of the defendant established by said Act, in the sum of Ten Thousand Dollars (\$10,000.00), but that said George Salter, deceased, never received a certificate of his compliance with the War Risk Insurance Act, but that after making said application for insurance and during the entire term of George Salter's service under the War Department, as aforesaid, there was deducted from his monthly pay for such service for the defendant, United States of America, through its proper officers, the monthly premiums upon said War Risk Insurance provided for by said Act and the rules and regulations promulgated thereunder by the War Risk Insurance Bureau and the Director thereof. [98]

V.

That the said George Salter, deceased, died on the 4th day of October, 1918, while said insurance was in full force and effect, and was killed in action while fighting with the armed forces of the defendant in the American Expeditionary Forces in France; that in his said application for insurance, said George Salter, deceased, named himself as beneficiary and that said insurance matured after the death of George Salter, deceased, on the 4th day of October, 1918, and on said day became payable to the estate of said George Salter, deceased.

Defendant's Exhibit No. 10—(Continued)

VI.

That prior to the commencement of this action the said Ella May Stanton Wood, made demand upon the United States of America and upon the United States Veterans Bureau and the Director thereof for the benefits of said insurance and for the payments due under the provisions of the War Risk Insurance Act as amended and the insurance so applied for by the said George Salter, deceased, for the death benefits of said insurance; that the said defendant, and the said Bureau, and the said Director thereof, denied the claim of plaintiff Ella May Stanton Wood, administratrix, to said benefits of said War Risk Insurance Act as amended, and of the insurance so applied for under said Act by the said George Salter, deceased, and have refused and still continue to refuse to grant any benefits to the estate of George Salter, deceased, and to pay to it any amount under said contract, and there now exists a disagreement between plaintiffs and the said defendant, the United States of America, and the said United States Veterans Administration, successor to the United States Veterans Bureau, and the Administrator thereof, within the meaning of the War Risk Insurance Act of Congress and the amendments thereof.

VII.

That under the provisions of the War Risk Insurance Act [99] and the amendments thereto, the estate of George Salter, deceased, is entitled to the payment of the entire benefits of said War Risk

Defendant's Exhibit No. 10—(Continued)

Insurance policy because of the death of said insured, such benefits amounting in all to the face value of said policy of Ten Thousand Dollars (\$10,000.00) and the accrued interest thereon of Thirty-Eight Hundred Dollars (\$3800.00), and there is now due the estate of George Salter, deceased, from the defendant on said insurance, the sum of Thirteen Thousand Eight Hundred Dollars (\$13,800.00).

Wherefore plaintiffs pray judgment against the defendant for the sum of Thirteen Thousand Eight Hundred Dollars (\$13,800.00) in favor of the estate of George Salter, deceased, to be paid to Ella May Stanton Wood, as the administratrix thereof, and that the judgment herein provide for the payment to plaintiffs' attorneys a fee of 10% of such judgment, and that plaintiffs be awarded such other and further relief as to this honorable court may seem meet and proper in the premises.

SMITH, MAHAN & SMITH,

Attorneys for Plaintiffs.

(Duly Verified.) [100]

Defendant's Exhibit No. 10—(Continued)

In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.

In the Matter of the Estate of
GEORGE SALTER, Deceased.

DECREE DETERMINING HEIRSHIP,
OWNERSHIP AND INTEREST

This day, the petition of Peter Salter and John Salter, for the determination of heirship, ownership and interest in and to the estate of George Salter, deceased, coming on regularly to be heard, the said petitioners being represented by their counsel, Carl J. Christian, Esq., the said Carl J. Christian having filed herein with said petition and at the same time said petition was filed, written evidence of his authority to so appear, which said written evidence is written in the English language and signed by said petitioners, Peter Salter and John Salter, entry of which said appearance of said Carl J. Christian was by order of the court made in the minutes of the court, and the register of the proceedings of said estate, and the administratrix of said estate being represented by counsel John W. Mahan, Esq., and their being no appearing in person or by counsel of any other person or persons, and due proof having been made to the satisfaction of the court that service of the notice of this hearing upon all persons claiming any interest in said estate, and upon Ella May Stanton as administratrix of the estate of said deceased, and upon Olive Crabtree, has been

Defendant's Exhibit No. 10—(Continued)

duly made and given as required by law and by the order of the above entitled court herein, the court thereupon made and entered upon the minutes of the court an order establishing proof of service of such notice in the manner and for the time required by law and by the order of this court;

And the time limited for appearing herein, as aforesaid, having expired, thereupon the court made and entered herein its order adjudging the default of said Olive Crabtree and of all persons named and unnamed, other than said petitioners for not appearing herein as aforesaid, and for failure to appear and show cause why the court should not proceed to determine heirship, ownership and interest of all persons in and to the estate of said deceased, as required by the order of the above entitled court heretofore given, made and entered [115] herein, and thereupon the court proceeded to the hearing of said petition;

Whereupon, the court finds from the evidence submitted on the part of said petitioners that said deceased, George Salter, left surviving him no wife or children, father, mother or sister, but that said deceased left surviving him relatives, to-wit, Peter Salter, brother of said deceased, aged 54 years, residing at Corbally, Abbeylax, Ireland, and John Salter, brother of said deceased, aged 58 years, residing at Monmore, Ireland, who are the two and only heirs at law and next of kin of said George Salter, deceased, and that said Peter Salter and John Salter are the persons to whom all of the estate

Defendant's Exhibit No. 10—(Continued)

and property of said deceased, remaining in the hands of said administratrix of his estate, after payment of the debts and expenses of administration herein, shall be distributed, and the matter having been submitted to the court for decision and determination, and the law and the evidence having been fully considered, and it appearing to the court that the matters and things stated in said petition are true;

Now, Therefore, by virtue of the law and the premises,

It Is Ordered, Adjudged and Decreed, that the said Peter Salter and John Salter are the two and only heirs at law of said George Salter, deceased, and that said Peter Salter and John Salter are the only persons entitled to share in the estate of said deceased; that said Peter Salter and John Salter are entitled to all of the residue of the property of the estate of said deceased after payment of the debts and expenses of administration, and that the said Peter Salter and John Salter are entitled to a decree of final distribution made in the course of administration of said estate, in the above entitled court, distributing to them all of the residue of said estate in the manner provided by law, and in accordance with the laws of the State of Montana, and that upon distribution of said estate, the residue of said estate, after payment of debts and expenses of administration, including the costs of this proceeding, shall be distributed to Peter Salter and John Salter.

Defendant's Exhibit No. 10—(Continued)

That said estate of said deceased consists of personal [116] property only, to-wit, of a policy of War Risk Insurance in the sum of \$10,000.00, with the Government of the United States of America; it is further Ordered, Adjudged and Decreed, that until such estate shall be finally closed and distributed, it shall be subject to the control of this court, the possession of said administratrix, and to the payment of all charges for and on account of, and for the purpose of administration of said estate:

It is further, Ordered, Adjudged and Decreed, that the administratrix of said estate pay to Carl J. Christian, attorney for petitioners, out of the funds of said estate, the sum of Fifteen Dollars (\$15.00) to reimburse him for the amounts paid by him to the Clerk of the above entitled court for filing said petition and for entry of judgment and decree to determine heirship herein and the amount paid the Montana Labor News for publication of said notice of hearing said petition to determine heirship, as ordered by this court.

Done in open Court this 3rd day of October, A. D. 1932.

JEREMIAH J. LYNCH,
Judge.

[Endorsed]: Filed Oct. 3, 1932. [117]

Defendant's Exhibit No. 10—(Continued)
In the District Court of the United States
District of Montana, Helena Division

ELLA MAY STANTON WOOD, Admx. of Estate
of George Salter, deceased; JOHN SALTER
and PETER SALTER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

DEMURRER

Comes now the defendant in the above entitled action and demurs to plaintiff's amended complaint on file herein, upon the ground, and for the reason that said complaint does not state facts sufficient to constitute a cause of action against said defendant.

WELLINGTON D. RANKIN,
United States Attorney,
District of Montana.
D. L. EGNEW,
Assistant U. S. Attorney,
Attorneys for the Defendant.

Due service of the foregoing Demurrer and receipt of a true copy is hereby acknowledged this 3rd day of March, 1933.

SMITH, MAHAN AND SMITH

[Endorsed]: Filed March 4, 1933. [119]

Defendant's Exhibit No. 10—(Continued)
[Title of District Court and Cause.]

ORDER SUSTAINING DEMURRER

The demurrer is sustained.

No matter what the effect of the State Probate decree between those notified and required to appear, it is horn-book law that the United States is never required to submit to any court save as *some its* statutes provide; and since *none its* statutes require it to appear in said state court, the consequence is that so far as it is concerned the decree of heirship is so much waste paper. There must be due allegation of heirship and of course due proof at trial.

BOURQUIN, J.

[Endorsed]: Filed March 22, 1933. [120]

In the District Court of the United States, in and
for the District of Montana, Helena Division

#1429

JOHN R. HALEY, as Administrator of the Es-
tate of George Salter, Deceased; JOHN
SALTER, and PETER SALTER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

FOURTH AMENDED COMPLAINT AT LAW

Leave of Court being first had to substitute the

Defendant's Exhibit No. 10—(Continued)

name of John R. Haley as administrator of the estate of George Salter, deceased, in lieu of Ella May Stanton Wood, resigned, and to file a fourth amended complaint, come now the plaintiffs above named and file this their fourth amended complaint and for cause of action against the Defendant, complain and allege:

I.

That Ella May Stanton Wood was duly and regularly appointed as administratrix of the estate of George Salter, deceased, by order of the District Court of the 2nd Judicial District of the State of Montana in and for the County of Silver Bow, regularly made and entered therein in the matter of the Estate of George Salter, deceased, on the 11th day of August, 1930, and served as said administratrix of said estate from the 11th day of August, 1930, to June 2nd, 1934; that the Plaintiff, John R. Haley is now the duly and regularly appointed, qualified and acting administrator of the estate of George Salter, deceased, appointed by order of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, in the matter of the estate of George Salter, deceased, regularly made and entered therein on the 2nd day of June, 1934; that letters of administration were duly and regularly issued to the Plaintiff, John R. Haley by said Court on the 2nd day of June, 1934, and the same have never been revoked and are now in full force [127] and effect, and as such administrator he succeeded Ella May Stanton Wood, who resigned.

Defendant's Exhibit No. 10—(Continued)

II.

That the Plaintiffs John Salter and Peter Salter are brothers of George Salter, deceased; that the father and mother of George Salter, deceased, are now dead; that George Salter, deceased, was never married and consequently left no issue; that the said George Salter, deceased, has no sister living; that the said John Salter and Peter Salter are heirs at law of George Salter, deceased, and are the only heirs at law of the said George Salter, deceased; that under the intestate laws of the State of Montana, John Salter and Peter Salter are entitled as brothers, and as the only heirs at law of said deceased to inherit the whole of the estate of the said George Salter, deceased; that George Salter, deceased, died intestate a resident of Silver Bow County, Montana on the 4th day of October, 1918, and his estate is entitled to be distributed under the intestate laws of the State of Montana, and that the said John Salter and Peter Salter are entitled to have the residue of said estate distributed to them as aforesaid.

III.

That a proceeding was had in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow in the matter of the estate of George Salter, deceased, probate file No. 9105 to determine heirship in said estate; that in said proceeding which complied with the provisions of the laws of the State of Montana in all respects for proceedings to determine

Defendant's Exhibit No. 10—(Continued)

heirship, and that on or about the 3rd day of October, 1932 said Court by order and by decree, duly, regularly entered and filed in said Court on said day, the Court having jurisdiction to make such decree, determined and decreed the said John Salter, and the said Peter Salter to be brothers of George Salter, deceased, and to be the only heirs at law of said deceased, and as such entitled to inherit the whole of the estate of said George Salter, deceased, under the intestate laws of the State of Montana; that in said proceeding said Court had jurisdiction of the subject matter and of the parties; [128] that attached hereto, and by this reference made a part hereof is Plaintiff's "Exhibit A", which is a certified copy of the said proceedings had in said Court and which includes said decree of said Court determining heirship as aforesaid; that the said decree of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, a certified copy of which is attached hereto and made a part hereof as aforesaid adjudicates and determines the matter of the heirship in the estate of George Salter, deceased, and is binding upon the above entitled Court.

IV.

That on or about the 27th day of April, 1918, at the City of Butte, County of Silver Bow, State of Montana, George Salter, now deceased, enlisted and was inducted into the armed forces of the defendant, the United States of America, with the grade of private and served under the War Department in the army of the United States with the

Defendant's Exhibit No. 10—(Continued)
grade of private in the Infantry Division from the said 27th day of April, 1918, until the 4th day of October, 1918, and was, during all of said time, employed in the active military service of the United States, under the direct supervision of its War Department in the war with Germany and her Allies; that at the time of his enlistment, April 27th, 1918, the said George Salter, now deceased, was a legal resident of Silver Bow County, Montana.

V.

That on or about May, 1918, the said George Salter, now deceased, made application to the proper officers of the United States for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress and the regulations of the War Risk Insurance Bureau of the defendant, established by said Act, in the sum of Ten Thousand Dollars (\$10,000.00), but that said George Salter, deceased, never received a certificate of his compliance with the War Risk Insurance Act, but that after making said application for insurance, and during the entire term of George Salter's service under the War Department, as aforesaid, there was deducted from his monthly pay for such service for the defendant, United States of America, through its proper officers, the monthly premiums [129] upon said War Risk Insurance provided for by said Act and the rules and regulations promulgated thereunder by the War Risk Insurance Bureau and the Director thereof.

Defendant's Exhibit No. 10—(Continued)

VI.

That the said George Salter, deceased, died on the 4th day of October, 1918, while said insurance was in full force and effect, and was killed in action while fighting with the armed forces of the defendant in the American Expeditionary Forces in France; that in his said application for insurance, said George Salter, deceased, named himself as beneficiary and that said insurance matured after the death of George Salter, deceased, on the 4th day of October, 1918, and on said day became payable to the estate of said George Salter, deceased.

VII.

That prior to the commencement of this action, Ella May Stanton Wood as administratrix of the estate of George Salter, deceased, made written demand upon the United States of America and upon United States Veterans' Bureau and the director thereof for the benefits of said insurance and for the payments due under the provisions of the War Risk Insurance Act as amended, and the insurance so applied for by the said George Salter, deceased, for the death benefits of said insurance payable to the estate of George Salter, deceased, that said defendant and the said Bureau and the said director thereof in a letter written to Ella May Stanton Wood, administratrix of the estate of George Salter, deceased, received by her in the due course of mail denied the claim of said administratrix to said benefits of said War Risk Insurance Act as amended, and for the insurance

Defendant's Exhibit No. 10—(Continued)

so applied for under said act by the said George Salter during his lifetime, and have refused, and still continue to refuse, to grant any benefits to the estate of George Salter, deceased, and to pay to it any amount under said contract, and there now exists a disagreement between Plaintiffs and the said Defendant the United States of America and the said United States Veterans' Administration, successor to the United States Bureau and the administrator thereof, within the meaning of the War Risk Insurance Act of Congress and the [130] amendments thereof.

VIII.

That under the provisions of the War Risk Insurance Act and the amendments thereto, the estate of George Salter, deceased, is entitled to the payment of the entire benefits of said War Risk Insurance Policy because of the death of said insured, such benefits amounting in all to the face value of said policy of Ten Thousand Dollars (\$10,000.00), and there is now due the estate of George Salter, deceased, from the defendant on said insurance, the sum of Ten Thousand Dollars (\$10,000.00).

Wherefore plaintiffs pray judgment against the defendant for the sum of Ten Thousand Dollars (\$10,000.00) in favor of the estate of George Salter, deceased, to be paid to John R. Haley, as administrator thereof, and that the judgment herein provide for the payment to plaintiffs' attorneys a fee of 10% of such judgment, and that plaintiffs be

Defendant's Exhibit No. 10—(Continued)
awarded such other and further relief as to this
honorable court may seem meet and proper in the
premises.

JOHN W. MAHAN,
Helena, Montana,
Attorney for Plaintiff.

(Duly verified.) [131]

[Title of District Court and Cause.]

DEMURRER TO FOURTH
AMENDED COMPLAINT

Comes now the defendant above named and demurs to the Fourth Amended Complaint of the plaintiffs on file herein, and for grounds of demurrer says:

1. That the said Fourth Amended Complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiffs, or either of them and against the defendant above-named.

2. The said complaint is ambiguous, uncertain and unintelligible, in that it cannot be ascertained therefrom when or upon what date the administratrix of the estate of George Salter, deceased, made written demand upon the defendant and the United States Veterans Bureau and the Director thereof for the benefits of said insurance, or

When or upon what date the Director of the Bureau or the said Bureau mailed the letter of

Defendant's Exhibit No. 10—(Continued)
denial referred to in paragraph 7 of the said
amended complaint to the said administratrix.

JAMES H. BALDWIN

United States Attorney

R. LEWIS BROWN

Assistant U. S. Attorney

FRANCIS J. McGAN

Attorney, Department of
Justice

Attorneys for Defendant.

[149]

The within demurrer was submitted by counsel
for the parties named therein without argument;
and the demurrer and the amended complaint hav-
ing been considered by this Court, and the court
being duly advised, and good cause appearing there-
for, the said demurrer is hereby sustained.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed Aug. 11, 1934. [150]

[Title of District Court and Cause.]

OPINION

This is an action on a contract of War Risk In-
surance issued to George Salter, a soldier of the
United States in the World War of 1918, and
brought by the administrator of his estate to re-
cover certain amounts therein named to pay credi-
tors' claims, attorney's fees and costs of adminis-

Defendant's Exhibit No. 10—(Continued)

tration, which had been allowed by the state district court of Silver Bow County, Montana.

One of the claims in the sum of \$1495.83 filed in the state court was that of Hilma Nicholson, as administratrix of the estate of Mary Johnson, deceased, which was allowed for \$748.00. Another claim in the sum of \$2528.00 was filed by Ella May Stanton Wood and allowed by the said court for \$1000.00. Plaintiff alleges there was no money in the estate. The state court allowed expenditures of the administrator in the sum of \$1,408.81, his fees of \$500.00, and those of his attorney for \$750.00. Interest on said claims was also allowed in the sum of \$847.78, and the total sum found to be due from the estate of said George Salter, as allowed by the state court, amounted to \$4,004.59. This soldier was granted War Risk Insurance in the sum of \$10,000.00 in May, 1918, and premiums were paid by deductions from his monthly pay; the insured died October 4th, 1918, while his insurance was in full force and effect. One of the creditors, Ella May Stanton Wood, made a demand on the Veterans' Bureau for insurance benefits which was denied January 19th, 1937. Plaintiff claims that, as administrator, he is entitled to the payment of the total sum above named out of the benefits of the War Risk Insurance policy on the death of the insured.

The Answer to the Amended Complaint admits the induction of the insured into the army April 25, 1918; his service until the 4th of October, 1918, when he was killed in action; the granting on May

Defendant's Exhibit No. 10—(Continued)

6, 1918 [154] of a contract of yearly renewable term insurance, and that his insurance was in full force and effect at the time of his death; that in his application for insurance he named himself as beneficiary, and that he left no heirs or next of kin, who would be entitled to distribution of his estate under the laws of the State of Montana. All other allegations of the complaint were denied. As a second defense the Answer presented a motion to dismiss the case on the ground that the amended complaint failed to state facts sufficient to constitute a claim against the defendant upon which relief could be granted. The case was tried to the court without a jury and submitted on briefs.

It appears from exhibits attached to the Amended Complaint that the claim of Hilma Nicholson as administratrix of the estate of Mary Johnson, deceased, was a charge for ten months board and lodging, laundry, etc., from June 1st, 1917 to May 1st, 1918, at the rate of \$75.00 per month; there was also an interest charge of \$745.83. As alleged this claim was allowed for \$748.00 June 4th, 1932 by the state court. The claim of Ella May Stanton Wood for \$2528.00 consisted of a loan of \$300.00 and an interest charge of \$332.00; also an additional charge of \$900.00 for nursing and care of George Salter for 180 days at \$5.00 per day between February 1, 1917 and October, 1917, with an interest charge thereon amounting to \$996.00. This claim was allowed by the state court for \$1000.00 June 4th, 1932. On March 16th, 1940, the Judge of the District Court, Second Judicial District of the State

Defendant's Exhibit No. 10—(Continued)
of Montana in and for Silver Bow County, wherein the estate was being administered, entered an order, allowing report, settling account, allowing administrator's and attorney's fees, claims of the two creditors, costs and charges of administration, in the sums aforesaid and as shown in the exhibit. The petition for the above order, allowance of claims and settlement of account, recites that "notice was given at least ten days before the day of said hearing, by mailing a copy of said notice of hearing to John B. Tansil, United States Attorney for the District of Montana, Butte, Montana", but it appears from the evidence that this notice to the United States Attorney required him to appear on March 2nd, 1940, and that no hearing was held on [155] that date and that he received no further notice.

At one time, back in 1930, Ella May Stanton, as administratrix of the soldier's estate, commenced an action against the United States, in the above named federal court, Helena Division, to recover monthly benefits of the said insurance policy for the estate from date of death. In 1933 an amended complaint was filed in which John Salter and Peter Salter were introduced and alleged to be brothers of deceased, the state court for Silver Bow County having theretofore entered a decree of heirship to that effect, and having held that they were the only heirs at law of said deceased and entitled to inherit all of his estate: copy of this decree was attached as an exhibit to the amended complaint, to which Judge Bourquin sustained a demurrer,

Defendant's Exhibit No. 10—(Continued)

holding that: "no matter what the effect of the state probate decree between those notified and required to appear, it is horn-book law that the United States is never required to submit to any court save as *some its* statutes provide; and since none of its statutes require it to appear in said state court, the consequence is that so far as it is concerned the decree of heirship is so much waste paper. There must be due allegation of heirship and of course due proof at trial."

In 1933 and 1934, other amended complaints were filed, the last one substituting John R. Haley as administrator in place of Ella May Stanton Wood who had resigned, and alleging that the Probate Court had determined by decree that John Salter and Peter Salter were the brothers and only heirs of said deceased, and attached thereto was a certified copy of the Probate Court proceedings. A demurrer to the foregoing amended complaint was sustained on the ground that it failed to state facts sufficient to constitute a cause of action, and further that the same was uncertain in jurisdictional allegations of demand and denial; on February 4th, 1936, a motion to dismiss for failure to amend was granted.

The defendant objected to the admission in evidence of matters relating to the claims of creditors, allowance of report, settling of account, orders, allowance of fees of administrator and attorney by the state court of Silver Bow County. Plaintiff objected to the introduction of the Judgment Roll

Defendant's Exhibit No. 10—(Continued)
in case No. 1429 which was the [156] case in which Judge Bourquin made the ruling above quoted in sustaining the demurrer.

The complaint in the first action and the original complaint in this action alleged that John and Peter Salter were brothers of the deceased, and if Judge Bourquin had accepted the proof of heirship made and allowed in the state court to that effect, the insurance money would have been paid out to the administrator for the benefit of these alleged brothers, who, as was afterwards established by the F. B. I. were of no relation to the deceased. If Judge Bourquin's ruling was correct in respect to proof of heirship in the state court, it would seem to follow according to his application of the rule that his decision would have been exactly the same had the creditors' claims and administration charges been before him on the same kind of proof made in the state court.

Counsel contend that under the rule of law established in our own circuit in *Hardy v. North Butte Mining Co.*, 22 Fed. (2) 62, and in *Carnegie Nat. Bank v. City of Wolf Point*, 110 Fed. (2) 569, this court is bound by Judge Bourquin's decision heretofore quoted; that the same parties, or their successors, are present in this case; the same insurance policy; the same kind of proof, made in the state court, is offered here as an exhibit attached to the complaint, and that substantially the same record and questions are now before the same court with the same relief being sought. Whether this court is bound by Judge

Defendant's Exhibit No. 10—(Continued)

Bourquin's ruling or not, the claims of creditors and allowances made in the state court have not been established by competent proof in this court, and for that reason it would seem that the rule invoked by Judge Bourquin, which this court believes to be the correct rule, should apply in this case, and that the motion to reject such evidence should be sustained. Such a ruling at this point would end the case, but there is another important question which has been extensively dealt with by counsel in briefs and oral argument, which the court believes should also be considered, and that is whether the claims of creditors, expenses and charges of administration incurred in the state court, could be recovered from the contract of insurance of said soldier with the government. In considering this further issue it may be assumed that [157] the required allegations have been made and established by competent evidence in this court. It is admitted that the insured died intestate, leaving no heirs surviving him, and that the plaintiff seeks only an award of so much of the insurance money as would be sufficient to pay the alleged debts of the insured and the costs of charges of administration in the amount aforesaid. Under the state of facts here and the law applicable it would seem that the insurance would not be payable, and that it would escheat to the United States under sections 451 and 514, Title 38, U. S. C. A., but in that connection another issue should be considered and that is whether the insurance money

Defendant's Exhibit No. 10—(Continued)

would be exempt from the claims of creditors under Sections 454 and 454a, Title 38, U. S. C. A.

The Supreme Court held in *Pagel, et al v. Pagel, et al*, 291 U. S. 473, under Section 454, that "It is clear that the statute does not extend the exemption beyond the insured and his beneficiary." In that case an award had been made to the estate of the insured and there were heirs who would inherit the insurance money. The question there for determination was whether the creditors of insured could be paid out of the insurance money or whether the exemption provided in Section 454 would survive the insured for the benefit of his heirs. Under the facts in that case the court decided that the insurance money held by the Administrator was subject to the claims of the creditors. But it further appears that section 454, which was the basis of that decision, was repealed at the next session of Congress and a broader statute enacted in its place, known as section 454a, which reads as follows: "Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. * * *" It will be noted that the new statute so changed the law under which the *Pagel* case was decided as to exempt payments made on account of a beneficiary under any of the laws

Defendant's Exhibit No. 10—(Continued)

relating to veterans. The insurance in this case was taken out by the veteran and payable to himself as beneficiary, and therefore any [158] payments that might be made would have to be made on account of the beneficiary, and under the altered provisions of the statute such payments are declared to be exempt. Counsel for the government states that his research has not disclosed any case wherein this new statute has been the subject of judicial comment by any federal court, and this court thus far has found none. However, there are two cases from the state courts construing section 454a, and one of them seems to be an important and well reasoned decision, and is known as *In re McCormick's Estate*, 8 N. Y. S. 2d 179. In this case the court held that the insurance money in the hands of the administrator of a veteran's estate is not subject to the claims of creditors under the new or amended statute; that the manifest intention of Congress in changing the law was to extend the exemption not only to the soldier himself but to his estate as well; that any payment of insurance benefits to his estate would be made on account of the insured. Counsel for plaintiff cited *Brown v. United States*, 65 F. (2) 65, C. C. A. 9, as determinative of the instant case, but it clearly appears from a perusal of that authority that the two cases are entirely different in respect to the issues involved.

The reply of government counsel to that claim seems to dispose of the argument completely. The decision in the *Brown* case made no reference to

Defendant's Exhibit No. 10—(Continued)

Section 454, was decided before the enactment of 454a, or the amendment thereto of October, 1940. It held that the probate of the nuncupative will of the deceased soldier was lawful, but no question was raised or decided there as to whether the proceeds of the insurance policy were exempt from the claims of creditors. The other case cited by counsel refers to a dictum to the effect that Section 454a creates an exemption of proceeds in favor of "Veterans, their children, widows and estates." (*Culp v. Webster*, 25 Cal. App. 2d. Supp. 759, 70 Pac. 2nd, 273, 275.)

After a careful consideration of this voluminous record, arguments of counsel, briefs and authorities, the court has been unable to find ground for agreement with plaintiff's contentions. The court has already practically held that the rule established by Judge Bourquin is the correct rule of law to apply in this case, [159] but if this court had held otherwise it would seem that a favorable result for plaintiff could not be attained in view of the provisions of Section 454a and in either event, the motion to dismiss would have to be granted.

Consequently, in the opinion of the court, the defenses interposed by counsel for the government should be sustained, as above indicated, and it is so ordered, with costs to the defendant.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Aug. 21, 1942. [160]

In the District Court of the United States for the
District of Montana, Great Falls Division

No. 199

JOHN R. HALEY, as Administrator of the Estate
of GEORGE SALTER, Deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial at Great Falls, Montana, on the 14th day of November, 1941, before this Court, Honorable Charles N. Pray, Judge, presiding without a jury, and after hearing all of the evidence and considering the arguments of counsel and briefs submitted, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That John R. Haley is the duly qualified and acting administrator of the estate of George Salter, deceased.

2. That George Salter was inducted into the military service of the United States April 25, 1918.

3. That on May 6, 1918, George Salter, the insured herein, applied for and was granted a policy of War Risk Term Insurance in the principal sum of \$10,000.00; that said insured named himself as beneficiary of said insurance, and that said insur-

ance was in full force and effect at the time of the insured's death.

4. That the said insured was killed in action October 4, 1918, and at the time of his death was a resident of the State of Montana; that said insured died intestate and at the time of his death he had no known heirs or next of kin, who would be entitled to distribution of his estate under the laws of the State of Montana. [162]

5. That demand for insurance benefits was filed by the Administratrix of the estate of the insured herein March 9, 1930, and that the same was denied January 19, 1937.

From the foregoing facts the Court concludes as a matter of law, to-wit:

CONCLUSIONS OF LAW

1. That the Court has jurisdiction of this action.

2. That according to provisions of Section 514, Title 38, U. S. C. A., said insurance is not payable to the estate of the insured.

3. That under the provisions of Section 454 a, Title 38, U. S. C. A., said insurance is not subject to the claims of creditors of the insured.

4. That the complaint herein should be dismissed on its merits.

Judgment may be entered accordingly.

Dated this 14th day of September, 1942.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed Sept. 14, 1942. [163]

In the District Court of the United States for the
District of Montana, Great Falls Division.

No. 199

JOHN R. HALEY, as Administrator of the Estate
of GEORGE SALTER, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This cause came on regularly for trial at Great Falls, Montana, before this Court, Honorable Charles N. Pray, Judge, presiding without a jury, on November 14, 1941. The plaintiff was represented in court by his attorney, John W. Mahan, Esquire, Helena, Montana, and the defendant was represented by its attorneys, John B. Tansil, Esquire, United States Attorney for the District of Montana, and Francis J. McGan, Esquire, Attorney, Department of Justice. Witnesses were sworn and testified on behalf of the plaintiff and documentary evidence was received;

Whereupon, after argument of counsel, cause was taken under advisement by the Court, and both the plaintiff and defendant filed their briefs, and the Court, after having considered the evidence, the arguments of counsel and the briefs of the parties, filed his Findings of Fact and Conclusions of Law.

Wherefore, by virtue of the law and the premises, it is hereby Ordered, Adjudged and Decreed that

this action should be and the same is hereby dismissed on its merits.

Dated this 14th day of September, 1942.

CHARLES N. PRAY,

Judge.

[Endorsed]: Filed and entered September 14, 1942. C. R. Garlow, Clerk. By C. G. Kegel, Deputy. [165]

[Title of District Court and Cause.]

MOTION TO AMEND AND TO MAKE ADDITIONAL FINDINGS OF FACT AND TO AMEND THE JUDGMENT ACCORDINGLY.

Comes now Plaintiff in the above entitled action and respectfully moves the court to amend its findings of fact and to make additional findings of fact and to amend the judgment in said action accordingly, as follows to wit:

FINDINGS OF FACT

I.

That John R. Haley is the duly qualified and acting administrator d. b. n. of the estate of George Salter, deceased. Appointed by order of the District Court of the State of Montana, in and for the County of Silver Bow. That the estate of said George Salter, deceased, was first probated in said court on August 11, 1930—the original administratrix re-

signed and John R. Haley was appointed Administrator d. b. n. on June 2, 1934.

II.

That George Salter was inducted into the military service of the United States April 25, 1918.

III.

That on May 6, 1918, George Salter, the insured herein, applied for and was granted a policy of War Risk Term [167] Insurance in the principal sum of \$10,000.00; that said insured named himself as beneficiary of said insurance, and that said insurance was in full force and effect at the time of the insured's death.

IV.

That the said insured was killed in action October 4, 1918, and at the time of his death was a resident of the State of Montana; that said insured died intestate and at the time of his death he had no known heirs or next of kin, who would be entitled to distribution of his estate under the laws of the State of Montana.

V.

That demand for insurance benefits was filed by the Administration d. b. n. of the estate of the insured herein March 9, 1930, and that the same was denied January 19, 1937; and to make additional findings of fact as follows to wit:

VI.

That the District Court of the Second Judicial District of the State of Montana, in and for Silver

Bow County, duly and regularly took jurisdiction of the probate of the estate of George Salter, Deceased, and said Court retained jurisdiction thereof and said Court still has jurisdiction thereof, said estate having not been closed and during the process of the administration of the estate of said deceased, in the District Court of Montana, Silver Bow County, the Administratrix published notice to creditors; that within the time set forth in said notice and as allowed by law, Hilma Nicholson, Administratrix of the estate of Mary Johnson, deceased, duly and regularly filed her claim as said Administratrix, against the estate of George Salter, deceased, in the sum of \$1495.83: That within the time allowed Ella Many Stanton Wood also filed [168] her claim against the said estate in the sum of \$2528.00: That after due hearing the District Court of Silver Bow County, Montana, setting in probate, allowed said claims; Hilma Nicholson as Administratrix in the sum of \$748.00 and the claim of Ella Man Stanton Wood in the sum of \$1000.00; That both of said claims were duly and regularly allowed and approved by said District Court on the 4th day of June, 1932.

VII.

That in the due course of Administration of the estate of George Salter, deceased, in the District Court of Silver Bow County, Montana, the said District Court allowed costs of administration as follows:

Fees of Administrator	\$500.00
Fees of Attorney	\$750.00
Miscellaneous costs in the sum of...	\$158.81

making a total expense of Administration in said estate in the sum of \$1408.81: That the interest on said claims at six per cent per annum from the date they were allowed until the instant case was filed is \$847.78: That the total claims, interest thereon and costs of administrative duly and regularly allowed by the District Court of Silver Bow County, Montana having in probate the estate of George Salter, deceased, are \$4004.59.

VIII.

That the estate of George Salter, deceased, has no property or assets of any kind or character and there are no known assets and the Administrator has depended upon the War Risk Term Insurance of decedent to pay costs of administration and the debts of said estate. [169]

IX.

That \$4004.59 of the War Risk Term Insurance held by said Deceased at the time of his death would not escheat under the laws of the State of Montana, the State of the Deceased's residence at the time of his death.

JOHN W. MAHAN,
Attorney for Plaintiff, Helena, Montana.

[Endorsed]: Filed Sept. 24, 1942. [170]

[Title of District Court and Cause.]

MOTION TO SET ASIDE DECISION AND
FOR JUDGMENT FOR PLAINTIFF, OR,
IN THE ALTERNATIVE FOR A NEW
TRIAL.

Comes now the plaintiff, above named, and respectfully moves this court in the above entitled cause to set aside the decision, the finding of fact and conclusion of law and the judgment entered thereon and for judgment in his behalf on the grounds following:

I.

1. That the insured, George Salter, deceased, petitioned for and was granted his War Risk Term Insurance for the specific purpose of protecting his creditors in the event of his death.

2. That it was proved in the trial of said cause without contradiction that \$4004.59 of said insurance would not escheat under the laws of the State of Montana, the residence of said decedent as provided in Section 514, Title 38, U. S. C. A.; That the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, in the matter of the estate of George Salter, deceased, had the original jurisdiction of the probate of the estate of said deceased, and the same cannot by this defendant be collaterally attacked 61 Fed. (2d) 61.

3. That Section 454, Title 38, U. S. C. A. has no bearing on this case for the reason that it was not enacted into the law until August 12, 1935 and that

Section 454a, Title 38, U. S. C. A. was not enacted into law until October 17, 1940; that the insured acquired his insurance in May 1918, he was killed in action in October 1918, and the claims of the creditors allowed by the probate Court of Silver Bow County, Montana on June 4, 1932, more than three years prior to the enactment of Section 454, Title 38, U. S. C. A. and more than eight years prior to the enactment of 454a, Title 38, U. S. C. A.; that the claims of said creditors accrued, were made, and allowed by a Court of competent jurisdiction [172] years before the enactment of said limitation and that said limitation could not possibly, over these circumstances have any effect in regard to these particular claims. It is not challenged that the costs of administration are not properly payable, but the claims of creditors are challenged.

4. That it affirmatively appears from the evidence from this case introduced by the plaintiff, that the insured took out his insurance to protect his creditors and made the same payable to himself or his estate; that the insured was killed in action while said insurance was in full force and effect and that his estate made application for said insurance and the same was denied and that \$4004.59 of said insurance money is required to pay the costs of administration and the claims of creditors legally allowed.

II.

In the event plaintiff's motion to set aside the decision and judgment entered thereon, and for judgment for the plaintiff, is denied, then and in

that event, and in the alternative, the plaintiff prays that he be granted a new trial upon the grounds and for the following reasons.

1. Error in law occurring at the trial.

2. That the insured took out his insurance for the specific purpose of protecting his creditors and plaintiff did not believe that it was questioned at the trial by the defendant that he took out his insurance specifically to protect his creditors. Proof can be made at a new trial of that additional fact, if the same is by Court deemed necessary.

This motion is based and will be presented on the record and files herein, upon the pleadings, upon the exhibits introduced, upon the decision of the Court, findings of facts and conclusions of law and the judgment entered thereon.

Dated this 23rd day of September, 1942.

JOHN W. MAHAN,

Attorney for Plaintiff, Helena, Montana.

[Endorsed]: Filed Sept. 24, 1942. [173]

[Title of District Court and Cause.]

ORDER OVERRULING MOTIONS

The questions before the court at this time are on the "Motion to set aside decision and Judgment and for Judgment for Plaintiff, or, in the alternative, for a new trial", and "Motion to Amend and

to Make Additional Findings of Fact and to Amend the Judgment Accordingly.”

Both parties filed briefs; no reply brief was filed and time therefor has long since expired.

From the motions submitted and a careful examination of the briefs the court has been unable to find any serious issue raised that has not already been considered by the court following a trial of the issues and oral arguments and briefs of counsel. But the court has reconsidered the issues involved and the authorities relied upon by counsel and also by the Court in reaching a decision and has been unable to find a sufficient cause for changing the views expressed in the decision and findings heretofore rendered, or in the decree therein entered; consequently being duly advised and good cause appearing therefor, the said motions are hereby overruled and denied.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Oct. 29, 1943. [175]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above named Defendant, and to Hon. John B. Tansil, United States Attorney, and Hon. Francis J. McGan, Attorney, Department of Justice, Attorneys for said Defendant:

You and each of you will please take notice that the above named plaintiff hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, from the final judgment given, made, rendered and entered in the above entitled cause by the above entitled District Court, on the 14th day of September, 1942, dismissing the above entitled action upon the merits, and from the order of said District Court, given, made, rendered and entered in the above entitled cause on the 29th day of October, 1943, denying and overruling the motion of the plaintiff to amend and make additional findings of fact and to amend the judgment accordingly, and denying and overruling the motion of plaintiff to set aside said decision and judgment of said District Court and for judgment for plaintiff, or, in the alternative, for a new trial; and plaintiff appeals from the whole of said judgment and order.

Dated January 20th, 1944.

JOHN W. MAHAN,

C. E. PEW,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 20, 1944. [177]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That John R. Haley, Administrator, as principal, and Cora Read Pew and William L. Hunter, as sureties, hereby acknowledge themselves jointly and severally firmly bound unto the above named defendant, the United States of America, in the sum of Two Hundred and Fifty Dollars (\$250.00), lawful money of the United States, for the payment of which, well and truly to be made, we and each of us, respectively, bind ourselves and our and each of our heirs, executors and administrators, jointly and severally as afore-said, firmly by these presents.

Sealed with our seals and dated this 19th day of January, 1944.

The condition of the above obligation is such that whereas, the plaintiff is appealing to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of the above entitled District Court entered in the above entitled cause on September 14th, 1942, and from the order of said District Court entered on October 29th, 1944, denying and overruling certain motions made by the plaintiff after the entry of such judgment, now, therefore, if the plaintiff shall pay the costs of appeal if the appeal is dis- [179] missed or said judgment and order or either of them affirmed, or such costs as said appellate Court may award if said judgment or order are, or either of them is, modified, then this obligation to be void; otherwise to remain in full force and effect.

Dated January 19, 1944.

Estate of George Salter, Deceased;
JOHN R. HALEY,
Administrator.

[Seal] By JOHN W. MAHAN,
Atty. for Administrator,
Principal.

[Seal] CORA READ PEW,

[Seal] WILLIAM L. HUNTER,
Sureties.

State of Montana,
County of Lewis and Clark—ss.

Cora Read Pew and William L. Hunter, the sureties named in the foregoing bond, being first duly sworn, each for himself says: I am a resident and freeholder and householder within the County of Lewis and Clark, State of Montana, and am worth double the amount of the within bond, over and above all my just debts and liabilities, and not including property exempt from execution.

CORA READ PEW,
WILLIAM L. HUNTER.

Subscribed and sworn to before me this 19th day of January, 1944.

[Notarial Seal] BLANCHE MARES,
Notary Public for the State of Montana, residing
at Helena, Montana.

My Commission expires Apr. 4, 1945.

[Endorsed]: Filed Jan. 20, 1944. [180]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Hon. Harry H. Walker,
Clerk of the above entitled Court:

The plaintiff hereby designates, to be contained in the record on appeal in the above entitled cause, copies of the following papers:

The Complaint;

The Amended Complaint;

The Answer to the Amended Complaint;

The Decision of the Court;

The Findings of Fact and Conclusions of Law;

The Judgment;

The Transcript of Proceedings at Trial of Cause;

The Motion of plaintiff to amend and to make additional Findings of Fact and to Amend the Judgment Accordingly;

The Motion of plaintiff to set aside Decision and Judgment and for Judgment for Plaintiff, or, in the Alternative for a New Trial;

The Order of Court of October 29, 1943, denying and overruling said motions;

The Notice of Appeal;

The Bond on Appeal;

This Designation.

Dated January 20th, 1944.

JOHN W. MAHAN &

C. E. PEW,

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed Jan. 21, 1944. [182]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 183 pages, numbered consecutively from 1 to 183, inclusive, is a full, true and correct transcript of all portions of the record and proceedings designated by the parties as the record on appeal in case Number 199, John R. Haley, as Administrator of the Estate of George Salter, deceased, vs. United States of America, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Thirty-two and 95/100 Dollars (\$32.95) and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 1st day of February, A. D. 1944.

[Seal]

H. H. WALKER,

Clerk U. S. District Court,
District of Montana.

By C. G. KEGEL,

Deputy Clerk. [183]

[Endorsed]: No. 10727. United States Circuit Court of Appeals for the Ninth Circuit. John R. Haley, as Administrator of the Estate of George Salter, Deceased, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed April 7, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals,
For the Ninth Circuit.

JOHN R. HALEY, As Administrator of the Estate of George Salter, deceased,
Plaintiff, and Appellant,

vs.

THE UNITED STATES OF AMERICA,
Defendant and Appellee.

POINTS RELIED UPON BY APPELLANT
AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

To the Clerk of the Said Circuit Court of Appeals,
San Francisco, California.

Sir:

The Appellant hereby states the points on which

he intends to rely in this appeal, and designates the parts of the record he thinks necessary for the consideration of said points, as follows:

Points To Be Relied Upon By Appellant:

1. That George Salter died in the military service of the United States, while in line of duty, on October 4, 1918;

2. That at the time of his death said George Salter held a policy of War Risk Term Insurance for the sum of \$10,000.00, issued to him by the United States, and payable to him or his estate, and that at the time of his death all premiums which were due thereon had been paid;

3. That the estate of George Salter has been in process of probate since 1930, and still is in process of probate, in the district court of Silver Bow County, Montana, sitting in probate, of which county said George Salter was a legal resident at the time of his death;

4. That plaintiff (appellant) at all times since prior to the commencement of this action has been and still is the administrator of said estate;

5. That claims of creditors of said George Salter, and expenses of the administration of said estate, have been regularly allowed by said probate court, and that the only asset possessed by said estate out of which said claims and expenses can be paid is said policy of insurance;

6. That said George Salter left him surviving no known heirs or next of kin, and no last will and testament;

7. That a disagreement arose between appellant and the Veterans Administrator of the United States as to the payment of said insurance on January 23, 1937;

8. That said District Court of the United States for the District of Montana had jurisdiction of this action; and that the said Circuit Court of Appeals for the Ninth Circuit likewise has jurisdiction of this appeal.

DESIGNATION OF PARTS OF RECORD APPELLANT *THINGS* NECESSARY FOR THE CONSIDERATION OF THE FOREGOING POINTS:

Appellant designates as necessary to the consideration of the above points parts of the record herein as follows:

Name of Document	Page numbers of Record.
1. Complaint-at-Law,	3 to 10
2. Amended Complaint-at-Law,	39 to 46
3. Answer,	53 and 54
4. Transcript of Proceedings at Trial,	57 to 81
5. Complaint-at-Law,	82 to 84
6. Amended Complaint-at-Law,	97 to 100
7. Decree Determining Heirship,	115 to 117
8. Demurrer,	119
9. Order,	120
10. Fourth Amended Complaint,	127 to 131
11. Demurrer to Fourth Amended Complaint,	149
12. Order,	150

Name of Document.	Page numbers of Record.
13. Judgment of Dismissal,	151
14. Opinion of Judge Pray,	154 to 160
15. Findings of Fact and Conclusions of Law,	162 and 163
16. Judgment,	165
17. Motion to Amend and Make Addi- tional Findings of Fact and to Amend Judgment Accordingly	167 to 170
18. Motion to Set Aside Decision and Judgment and for Judgment for Plaintiff, or, in the Alternative for a New Trial,	172 and 173
19. Order Overruling Motions,	175
20. Notice of Appeal,	177
21. Bond For Costs on Appeal,	179 and 180
22. Designation of Contents of Record on Appeal	182
23. Certificate of Clerk to Record,	183

In order to make sure of our compliance with Rule 19 of this Court, and for the possible convenience of the Clerk in printing the Record, we state below the converse of the foregoing statement:

In printing the Record herein,	Pages of Record.
1. Omit verification, page 11, and Ex- hibits to Complaint,	12 to 37
2. Omit verification,	47
3. Omit Exhibits to Amended Complaint,	48 to 51
4. Omit Affidavits of Service,	55
5. Omit verification,	85

Name of Document.	Page numbers of Record.
6. Omit Summons and certification of Service,	86 and 87
7. Omit Demurrer,	88
8. Omit Answer,	89 to 92
9. Omit Amended Complaint,	93 to 96
10. Omit verification,	101
11. Omit Exhibits,	102 to 114
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In addition to the parts of the record above designated for printing, the title of the court and cause, the names of counsel for the respective parties, and such other formal parts as may be required by the rules or practice of the Court and of your office, will of course be printed.

Dated at Helena, Montana, March 31st, 1944.

JOHN W. MAHAN

C. R. PEW

Attorneys for Plaintiff and
Appellant.

Service of the foregoing statement of Points to Be Relied Upon by Appellant and Designation of Parts of Record to Be Printed and receipt of a copy thereof acknowledged this....day of March, 1944.

.....

United States Attorney for
the District of Montana,

.....

Special Attorney, Department
of Justice,
Attorneys for Defendant and
Appellee.

(Affidavit of Service by Mail Attached.)

[Endorsed]: Filed April 7, 1944. Paul P.
O'Brien, Clerk.

IN THE
United States
Circuit Court of Appeals

For the Ninth Circuit

JOHN R. HALEY, as Administrator of the Estate of George
Salter, deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

JOHN W. MAHAN, Helena, Montana,
CHARLES E. PEW, Helena, Montana,
Attorneys for Appellant and Plaintiff.

HONORABLE JOHN B. TANSIL,
United States District Attorney,
Butte, Montana.
MR. FRANCIS J. McGAN,
Special Attorney, Department of Justice,
Butte, Montana.
Attorneys for Appellee and Defendant.

FILED

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN R. HALEY, as Administrator of the Estate of George
Salter, deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

I.

**JURISDICTION OF THE DISTRICT COURT
AND OF THIS COURT**

This is an action by the Administrator of the estate of a deceased soldier upon a policy of War Risk Term Insurance issued by the United States under the War Risk Insurance Act of October 6, 1917.

Actions upon this insurance are authorized, and jurisdiction to try such actions is conferred upon the District Court of the United States, by

Section 445, Title 38, U. S. C.

That section also empowers the United States Circuit Courts of Appeal to review such actions on appeal.

This suit was brought within 90 days after disagreement, as permitted by

Section 445d, Title 38, U. S. C.

The pleadings and facts upon which jurisdiction in this case is based are analyzed in detail in the "Statement of Facts" immediately following.

II.

STATEMENT OF FACTS

(a) PLEADINGS:

On October 10, 1930, Ella May Stanton, as administratrix of the estate of George Salter, deceased, filed suit upon the policy of insurance held by deceased. (See defendant's Exhibit 10)

A fourth amended complaint was filed in that action. (Tr. pp. 70, et seq.)

The defendant demurred upon two grounds: first, that the complaint did not state a cause of action, and second, that the allegations of a disagreement were ambiguous, uncertain and unintelligible. (Tr. pp. 77-78)

This demurrer was by the Court sustained (Tr. p. 78) and the action was dismissed on February 11, 1936, because of the failure of the plaintiff to further amend, there being no trial upon the merits.

The judgment of dismissal was, apparently through inadvertence, omitted from the printed record, but it was in the original record filed in this Court. Counsel for defendant will doubtless admit these facts.

Counsel for plaintiff, being convinced that there had been no sufficient denial of the claim of plaintiff by the Veterans Administration, instituted proceedings in the District of Columbia to compel final action by the Veterans Administrator, with the result that the latter issued his letter of denial on January 19, 1937. (Par. VII of amended complaint, Tr. pp. 17-20)

On February 4th, 1937, plaintiff (appellant here) filed the present action. In the original complaint John and Peter Salter, supposed heirs of the deceased, were joined with Haley, the administrator, as plaintiffs. (Tr. p. 2)

Counsel concluding as the result of further inquiry instituted by him that the finding of heirship by the district court of Silver Bow County was erroneous because of the confusion of two George Salters, which fact was conceded by these supposed heirs, the amended complaint, upon which the issues were framed, was filed by John R. Haley, administrator, alone. (Tr. p. 12)

Facts Alleged in Amended Complaint:

The amended complaint alleges:

The appointment of Ella May Stanton as administratrix of the estate of George Salter by the district court of Silver Bow County, Montana, and the substitution of plaintiff as administrator on June 2, 1934; (Par. I, Tr. p. 12)

The death of George Salter on October 4, 1918, while a resident of Silver Bow County, Montana; (Par. II,, Tr. p. 13)

The allowance by the probate court of creditors claims aggregating \$1748.00, and administration costs of \$1408.81; (Par. III, Tr. pp. 13-15)

That said George Salter was inducted into the military service of the United States on or about April 25, 1918, with the grade of private, and served under the War Department in the infantry from said date until his death on October 4, 1918; that deceased was then a legal resident of Silver Bow County, Montana; (Par. IV, Tr. pp. 15, 16)

That he was granted by the United States \$10,000 of War Risk Term Insurance and that the monthly premiums were deducted from his pay during the entire term of his service under the War Department; (Par. V, Tr. p. 16)

That said insurance was made payable to the estate of said soldier, was in good standing at the time of his death on October 4, 1918, and thereupon passed to his estate; (Par. VI, Tr. p. 17)

That beginning with March 5, 1930, the administratrix and administrator aforesaid made demand of the Veterans Bureau and of the Veterans Administrator for the benefits of said insurance, but that final action upon such demands was not obtained until a writ of mandate was petitioned for by said Haley, administrator of said estate, in the Supreme Court of the District of Columbia; that thereafter, by letter dated January 19, 1937, and received by the plaintiff about January 23, 1937, the Veterans Administrator denied said claims; (Par. VII, Tr. pp. 17-20)

That the estate of George Salter, deceased, is entitled to \$4,004.59 of said insurance to pay said creditors claims

and expenses of administration; (Par. VIII, Tr. pp. 20-21)

Prayer is for judgment for that amount. (Tr. p. 21)

Answer:

The answer of the government

Admits that George Salter died on October 4, 1918, intestate, and leaving no heirs or next of kin entitled to distribution of his estate; (Par. II, Tr. p. 22)

Admits that George Salter applied for and was granted a \$10,000 contract of war risk term insurance on May 6, 1918; (Par. V, Tr. p. 23)

And that this insurance was in full force and effect at the time of the death of George Salter; and that he named himself as beneficiary; (Par. VI, Tr. p. 23)

Puts in issue by denials the other allegations of the amended complaint. (Tr. pp. 22, 23)

The cause came on for trial before the Court on November 14, 1941, both parties waiving a jury trial. (Tr. p. 24)

(b) EVIDENCE INTRODUCED AT TRIAL:

Evidence was introduced upon all issues, particularly:

1. The appointment and capacity of plaintiff as administrator of the George Salter estate. This proof was admitted without objection. (Tr. pp. 25-28)

2. The induction of George Salter into the United States Army on April 25, 1918, and his honorable service

therein until October 4, 1918, when he was killed in action; this being admitted by defendant; (Par. IV of Answer, Tr. p. 22, Tr. pp. 28-29)

3. That at the time of the trial there were no known relatives, which is admitted in the answer; (Par. II of Answer, Tr. p. 22, Tr. p. 28)

4. That George Salter was at the time of his induction a resident of Silver Bow County, Montana (this proof being admitted without objection by defendant); (Tr. pp. 29-30)

5. Disagreement was admitted by the defendant, also that the suit was filed in time; (Tr. p. 31)

6. That deceased was killed in action on October 4, 1918; (Par. IV of Answer, Tr. p. 22, Tr. pp. 31-32)

7. The filing and allowance of creditors claims in the Salter estate; (Tr. 33-39, Pltff's Exhibits Nos. 7 and 8)

8. The allowance of administration costs; (Tr. pp. 39-48, Pltff's Exhibit 9)

9. The fact that there was no property in the estate but this insurance; (Tr. pp. 33, 49)

10. The insurance contract is admitted in the answer (Par. V, Tr. p. 23) and it is also admitted that it was in full force and effect at the time of Salter's death; (Par. VI of Answer, Tr. p. 23)

(c) FINDINGS OF FACT AND CONCLUSIONS OF LAW:

On September 14, 1942, the District Court made and filed its findings of fact and conclusions of law. (Tr. pp. 88-89)

Findings of Fact:

The Court found as facts,

1. That the plaintiff is the duly qualified and acting administrator of the estate of George Salter, Deceased.
2. That George Salter was inducted on April 25, 1918.
3. That he was granted \$10,000 of insurance, payable to himself, and which was in good standing when he was killed.
4. That he was killed in action October 4, 1918, was a resident of Montana at the time of his death, died intestate, and without known heirs or next of kin. (Tr. pp. 88-89)

These findings of fact cover every issue of fact in this case except the allowance of creditor's claims and expenses of administration.

Conclusions of Law:

The Court found as a conclusion of law that it had jurisdiction of this case, but found further that the complaint should be dismissed upon the merits. (Tr. p. 89)

The District Court entered judgment dismissing the action. (Tr. pp. 90-91)

(d) PROCEEDINGS SUBSEQUENT TO JUDGMENT:

On September 24, 1942, the plaintiff (appellant here) filed his

MOTION TO AMEND AND MAKE ADDITIONAL
FINDINGS OF FACT AND TO AMEND THE
JUDGMENT ACCORDINGLY

(Tr. pp. 91-94)

On September 24, 1942, the plaintiff (appellant here) filed his

MOTION TO SET ASIDE DECISION AND FOR JUDGMENT FOR PLAINTIFF, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

(Tr. pp. 95-97)

On October 29, 1943, the District Judge, the Honorable Charles N. Pray, filed his order overruling these two motions. (Tr. pp. 97-98)

On January 20th, 1944, plaintiff's attorneys filed notice of appeal (Tr. p. 99) and bond for costs on appeal (Tr. pp. 100-101)

On January 21, 1944, counsel for appellant filed their designation of contents of record on appeal. (Tr. p. 102)

On April 7, 1944, the record on appeal, duly certified by the Clerk of the District Court, together with designation of parts of the record to be printed, were filed with the clerk of this Court. (Tr. pp. 104-107)

III.

SPECIFICATION OF ERRORS

1. The District Court erred in holding that under the provisions of Section 514, Title 38, U. S. C., the insurance was not payable to the said estate of George Salter, deceased;

2. The District Court erred in holding that under Section 454a, Title 38, U. S. C., the insurance was exempt from the claims against the estate of George Salter, deceased;

3. The District Court erred in not holding that sufficient of said insurance to liquidate claims against said

estate and expenses of administration was payable to plaintiff (appellant) as administrator of said estate;

4. The District Court erred in holding that the amended complaint should be dismissed upon the merits;

5. The District Court erred in entering judgment dismissing the action.

6. The District Court erred in not entering judgment in favor of the plaintiff for the amount of the claims established against the estate of George Salter, deceased, plus the expenses of administration;

7. The District Court erred in denying plaintiff's motion to amend the findings, make additional findings, and amend the judgment accordingly.

8. The District Court erred in denying the motion of plaintiff to set aside the decision and judgment and enter judgment for plaintiff, or alternatively, to set aside the judgment and grant a new trial.

9. The District Court erred in admitting in evidence the judgment roll in the former case, No. 1429, and in following a ruling of Judge Bourquin upon a demurrer to an amended complaint in that action.

IV.

FACTS ESTABLISHED

Briefly stated, George Salter, a soldier serving in the armed forces of the United States in World War No. 1, holding a war term policy for \$10,000, payable to himself or to his estate, was killed in action, leaving no will, no known heirs, and no assets except this insurance. His estate is being administered by the plaintiff in the probate

court of Silver Bow County, Montana, and debts and expenses of administration have been allowed by that court.

Appellant sues for enough of this insurance to pay these debts and expenses.

V. CONTENTION OF PARTIES

Appellant contends that he is entitled to recover upon the facts established, while appellee asserts that the government is exempt from the payment of any of this insurance under the provisions of Sections 454a and 514, Title 38, U. S. C., and at the trial objected to the introduction of proof of the allowance of claims in the estate, and moved for judgment consistently with these objections.

VI. ARGUMENT

The findings of fact made by the District Court (Tr. pp. 88-89) entitled the plaintiff to judgment unless it should appear that the insurance would escheat.

Under the facts, and under the law of this jurisdiction, the money prayed for would not escheat, and plaintiff is entitled to judgment, as we will now proceed to demonstrate.

(a) The Law Applicable to the Case at Bar

Since the amendment of March 4, 1925, the law defining the obligation of the government under these War Risk Insurance Policies, under the circumstances of this case, has been and still is as follows:

“If no person within the permitted class be designated as beneficiary for yearly renewable term in-

surance by the insured either in his lifetime or by his last will and testament * * * *there shall be paid to the estate of the insured* the present value of the monthly installments thereafter payable. * * * In cases when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation." (Italics ours.)

Sec. 514, Title 38, U. S. C.

This amendment came before the United States Supreme Court in 1932, in the case of

Singleton vs. Cheek,
284 U. S. 493,
76 L. ed. (U. S.) 419,
52 S. Ct. 257

where the Court said:

"By that amendment, the rule, upon which the happening of the contingencies named in the prior acts, limited the benefit of the unpaid installments to persons within the designated class of permittees, was abandoned, *and the 'estate of the insured' was wholly substituted as the payee.* All installments, whether accruing before the death of the insured or after the death of the beneficiary named in the certificate of insurance, as a result, *became assets of the estate of the insured as of the instant of his death,* to be distributed to the heirs of the insured *in accordance with the intestacy laws of the state of his residence.*"

In 1933 this Court had before it the same substantive questions as are presented here, in the case of

Brown vs. U. S.,
65 Fed. (2nd) 65.

In that case the soldier had made a nuncupative will by which he bequeathed his entire estate to Brown and his wife. The will was admitted to probate in the state probate court, and Brown was appointed administrator. Evidently the probate court did not limit the bequest to \$1,000.00 as provided by the California statute.

Brown, the administrator, applied to the Veterans' Bureau for the insurance, and his application being denied, he sued in the District Court of the United States for the Southern District of California. During the pendency of this suit the United States attorney petitioned the probate court to set aside the probate of this will, but the petition was denied.

The insurance suit was later tried, resulting in judgment for the government upon the ground that the probate court lacked jurisdiction, and that its decree admitting the will to probate was void; apparently upon the same theory as that advanced by counsel for the government in that case, namely, that the conditions contained in Sections 1289 and 1290 of the California Code were jurisdictional.

In fact, it appears from the opinion in the Brown case that the whole contest pivoted upon the question of the jurisdiction of the state probate court—a fact which makes the decision of this Court of the greatest significance.

After analyzing the decision of the Supreme Court in the case of

Singleton vs. Cheek,
284 U. S. 493,
76 L. ed. (U. S.) 419,

and quoting from the opinion, this Court said:

“This statement clearly indicates that any of the insurance money that thus becomes payable to his estate must be *distributed as his general estate is distributed.*”

Upon the question of jurisdiction this Court then said:

“So far as the record shows, there can be no doubt that the state court had jurisdiction over decedent’s estate. *Its decree is therefore free from collateral attack.*”

The Court held that under the California law the bequest must be limited to \$1000, and then laid down the following propositions, all of which apply directly to the case at bar:

1. That the limitation contained in Section 514 applies only to the portion of the insurance that would escheat;
2. That “before distribution, administration expenses and claims allowed against the estate must be paid. *The balance only would escheat.*”
3. That “the obligation of the government, therefore, is measured by the \$1000. for the legacy, *plus the sum required for the claims allowed and the administration costs,* less the value of any other property in the estate.” (Italics ours)

It is to be noted that the obligation to pay the amount of the debts and expenses is not contingent upon, *but is in addition to*, the obligation to pay the legacy. In other words, the obligation to pay the amount of these debts and expenses is an independent obligation.

This is the law of the Ninth Circuit, and applies with full force to the facts in the case at bar.

No question of the jurisdiction of the district court of Silver Bow County over the estate of George Salter has been raised by the appellee.

The state district courts have jurisdiction over "all matters of probate."

Mont. Const., Art. VIII, Sec. 11.

Letters of administration must be granted "in the county in which the decedent was a resident at the time of his death, in whatever place he may have died."

Sec. 10018, Rev. C. Mont., 1935.

"All the property of the decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration," etc.

Sec. 10195, Rev. C. Mont., 1935.

Chapters 108 to 144 of said Codes provide the procedure for the administration of estates.

All these or similar provisions have been in force in Montana since its admission to the Union in 1889.

The Montana Codes also provide that

"Whenever the title to any property fails for want of heirs or next of kin, it reverts to the State."

Sec. 28, Rev. C. of Mont., 1935.

This reversion takes place, however, only as to the property remaining after the payment of claims and administrative costs.

Sec. 10195, Rev. C. Mont., 1935, quoted above.

Eliminating from consideration the \$1000. legacy involved in the Brown case, we find the facts and the law in that case to be the same as here.

- (b) Section 454a Is an Exemption Statute, Applicable Only After Payment of Insurance, and Is Not a Defense to Payment in the First Instance

It would be unnecessary to pursue this discussion further were it not that the appellee sets up Sec. 454a, Title 38, U. S. C., as a defense, notwithstanding Section 514, the only section having to do with the right of recovery in the first instance, contains the only defense to payment—*escheat*.

Section 454a provides that:

“Payments of benefits due or to become due shall not be assignable, and *such payments made to, or on account of*, a beneficiary under any of the laws relating to veterans shall be exempt * * * from the claims of creditors.” (Italics ours)

Sec. 454a, Title 38, U. S. C.

Act of Aug. 12, 1935, 49 Stat. c. 510.

Section 22 of the World War Veterans Act of June 7, 1924, before amendment by the Act of Aug. 12, 1935, read as follows:

“That the compensation, insurance, and maintenance and support allowance payable under Title II, III and IV, respectively, shall not be assignable, shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV.”

Sec. 22, Act of June 7, 1924 (then Sec. 454, Title 38, U. S. C.)

The Supreme Court had this section before it for construction in

Pagel vs. Pagel,
291 U. S. 473,
78 L. ed. (U. S.) 921.

In that case the heirs of the deceased soldier, to whose estate the balance of the insurance had been paid after the death of the beneficiary, were claiming as heirs of the soldier and not as designated beneficiaries. They claimed exemption from the claims of creditors of the estate and from expenses of administration. Claims of creditors and administrative costs had been allowed to the amount of about \$3800.00, and the other assets were insufficient to pay them.

The Court said:

“The purpose of the exemption, Sec. 454 (Sec. 22 of the Act of 1924), is to *safeguard to the insured soldier and the beneficiary payments made under the policy to them or for their benefit.*” (Parenthetical note and italics ours)

Holding that the exemption applied only to the soldier or his designated beneficiaries, and not to those who became beneficiaries of the insurance through the estate of the soldier, the Court denied the claim of exemption.

The Pagel decision is important in two respects:

First, it defines the purpose of the exemption as being personal to those who receive the insurance. In other words, it is, like the ordinary exemption, available only to one who is about to be deprived of money intended for his personal use, and may be claimed only by such person.

Second, the decision recognizes the applicability of the insurance to the payment of the debts of the deceased soldier, even as against persons who succeed to the insurance, unless the exemption is specifically extended to them.

The amendment of August 12, 1935, by which Section 454a was made to read as that Section now appears in the United States Codes, made no change in the law upon which the Pagel decision was based, except only that it extended the exemption to those to whom payment is made "on account of" the deceased soldier. This amendment was undoubtedly inspired by the Pagel decision, and intended to extend the exemption to heirs who receive the insurance through the estate of the deceased soldier, such as those who were denied the exemption in the Pagel case.

If an heir of George Salter had appeared and established his right as an heir, he could properly raise the question of exemption under Section 454a; but this section provided no *defense to payment*, but has to do only with the disposal of the money *after payment*.

The exemption provision of Section 454a confers a right which lies dormant and inactive until some person coming within the purview of the section sets it up as a defense to a claim against money to which he is entitled for his personal use, *after the money has been awarded and paid*.

The question of exemption cannot arise under the circumstances here until after a payment has been made, and the insurance money has passed under the jurisdiction of the probate court.

It is fair to assume that if Congress had intended, as seems to be the contention of counsel for appellee, that the insurance money should never be used for the payment of creditors or expenses of administration it would have said so. The bare statement of such an intention is much easier made than the various provisions inserted in the different enactments.

When the decision in

Pagel vs. Pagel,
291 U. S. 473,
78 L. ed. (U. S.) 921,

was rendered, Congress simply enlarged the class of persons who could claim the exemption, but did not prohibit the use of the money to pay claims and expenses.

Sec. 454a, Title 38, U. S. C.

While not clear to us, the theory of the government seems to be that the federal court should take over the probate of the estate.

There is no federal statute which gives the Veterans Administration any power to supplant, or interfere with the functions of, the state probate court; and the federal court cannot go farther in a suit on the insurance.

The language of Section 514 is that under the circumstances of this case the money "*shall be paid to the estate of the insured,*" unless it will escheat. Nothing more.

The jurisdiction of the probate court of all matters arising in the administration of the estate is recognized in

Singleton vs. Cheeck,
284 U. S. 493,
76 L. ed. (U. S.) 419,

Pagel vs. Pagel,
291 U. S. 473,
78 L. ed. (U. S.) 921,

in which cases the questions involved were first passed upon by the probate courts and reached the Supreme Court upon certiorari to the State Courts.

The same principle is expressly declared by this Court in the case of

Brown vs. U. S.,
65 Fed. (2nd) 65.

We find no case in which this Court or the Supreme Court has in any way involved the manner of the distribution of the money after payment to the estate with the primary question of the liability of the government to the estate.

VII.

DEFENDANT'S EXHIBIT 10

We find it difficult to determine the government's theory with reference to its Exhibit 10, which is a transcript of the judgment roll in the former case, No. 1429. (Tr. pp. 56 et seq.) Doubtless defendant's counsel will elucidate in their brief.

However, nothing in that Exhibit can have any bearing upon the issues now before the Court for the following reasons:

1. No former adjudication was pleaded in the answer. (See Answer, Tr. pp. 22-23)

2. Judge Bourquin merely held that there was no statute requiring the government to go into the state court; (Tr. p. 70)
a proposition with which we agree.

3. The Court had no jurisdiction in the former action, there being no legal disagreement until after January 19, 1937, long after the dismissal of the former action. (Tr. p. 89)

Disagreement is jurisdictional.

Howard vs. U. S.,
2 Fed. (2nd) 170

Gallardo vs. U. S.,
5 Fed. (2nd) 678

4. The only question arising in the former case was as to the existence of heirs. The question whether claims and expenses of administration were a part of the obligation of the government under the insurance policy was not in that case.

VIII. CONCLUSION

Clearly, under the law of the Ninth Circuit, which is the only law applicable to this case,

1. The insurance money is payable to the estate of George Salter to the extent that it will not escheat;

2. To the extent of the administrative costs and allowed claims it will not escheat;

3. The decisions of the probate court allowing these costs and claims is not subject to collateral attack; and

4. No question of exemption can arise until after payment to the estate.

We respectfully submit that appellant is entitled to judgment as prayed.

JOHN W. MAHAN,
CHARLES E. PEW,
Attorneys for Appellant.

No. 10727

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

JOHN R. HALEY, AS ADMINISTRATOR OF THE ESTATE OF
GEORGE SALTER, DECEASED, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLEE

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FILED

JUL 15 1944

PAUL P. O'BRIEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10727

**JOHN R. HALEY, AS ADMINISTRATOR OF THE ESTATE OF
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v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MONTANA*

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This statement is deemed necessary because of inaccuracies as to pertinent matters and omissions of other such matters in appellant's statement (Br. 2-8), especially the omission of the ruling of the trial court rejecting evidence of an order and allowances by a Montana Probate Court which were essential to appellant's cause of action. He failed to challenge this ruling in the specification of errors (Br. 8-9), treating the evidence as admitted (Br. 6, 10).

This suit was brought against the United States in February 1937 (R. 11), by the appellant, John R. Haley, as administrator c. t. a. of the estate of George

Salter, a soldier who died in October 1918, while insured in the sum of \$10,000 under a contract of war risk term insurance (R. 16, 17, 23). The insured named himself as the beneficiary of the insurance (R. 23, 92). He died a resident of Montana, intestate (R. 13, 22) and without known heirs (R. 25, 28, 92) or assets (R. 14). The suit was brought to recover \$4,004.59 of the insurance proceeds, in order that the estate (which contained no assets) might obtain funds sufficient to enable the appellant to comply with an alleged order of the Montana court which granted the letters of administration, directing him as administrator to pay out of "any" assets in the estate allowances allegedly made by that court against the estate upon two creditors' claims, and for administrators' and attorney's fees and miscellaneous expenses of administration (R. 12, 13-15, 25-28, 35-39, 45-48). Appellant also sought another fee allowance for his attorney of 10 per cent of the amount of the insurance sought to be recovered (R. 21), \$750.00 of which was to pay the fee allegedly allowed the attorney by the Montana court.

The amended complaint alleged, in effect, that the amount of any assets which might be acquired by the estate, sufficient to pay the alleged allowances, would not escheat to Montana under the laws of that State; that, accordingly, under the Federal statutes governing war risk insurance, proceeds of the insurance in the amount so allowed were exempt from escheat to the United States and were payable by it to the estate of the insured for distribution in accordance with

the allowances (R. 20-21). There were no allegations as to the merits of the allowances, or that either the United States or the State of Montana was a party to the proceedings in the State court.

The Government filed an answer (R. 22-24) denying, *inter alia*, the allegations in the amended complaint (R. 12, 15) as to the proceedings and allowances in the State court and the effects thereof on the question of escheat and the Government's liability. Appellant offered in evidence copies of portions of the records of the Montana court, where the insured's estate was being administered,¹ which contained merely the claims of the two alleged creditors (one by the administratrix of the estate of an alleged creditor who had died, and the other by the former administratrix of the insured's estate who had resigned and been succeeded by appellant), supporting affidavits by the claimants alone (there being no affidavit by the alleged creditor who died), endorsements on each claim signed by a judge of the State court reciting, in effect, merely that the claim was "allowed and approved" June 4, 1932, in a specified amount, an additional endorsement on the claim of the administratrix of the estate of the alleged creditor who had died, by the administratrix of the insured's estate, to the effect merely that the latter had previously "allowed and approved" the claim in full (R. 35-39), and an order dated March 16, 1940 (R. 45-48), by another judge, approving a report and

¹ Objection was waived to the substitution of copies for the original record.

settling and allowing an account, both of which had been filed by appellant, reallowing the amounts of the creditors' claims as previously allowed by the other judge, and allowing, in addition, interest on such amounts from June 4, 1932, the date of the prior allowances, allowing a fee to the prior administratrix and appellant, as administrator d. b. n., jointly, an attorney's fee, and miscellaneous expenses of administration. The order directed the appellant, as administrator, to pay these amounts out of "any" assets in the estate (R. 46). The order recited that it was entered after a hearing of which "due and legal" notice was given by posting the notice in public places and mailing a copy to the local United States Attorney. It was established at the trial that the hearing was continued from the date set in the notice; that the United States Attorney did not receive notice of the date on which the hearing was held, and that the proceedings were *ex parte* (R. 40, 41, 42).

It further appeared by the testimony of the appellant's attorney, who was the only witness at the trial in the court below, that the administratrix of the insured's estate applied for her letters of administration in 1930 (R. 25), more than eleven years after the insured's death, October 4, 1918 (R. 32). Her claim (R. 38) purported to be for nursing at \$5.00 per day for 180 days between February 1 and October 1917 (\$900.00), loans of money aggregating \$300.00 between February 1, 1917, and April 25, 1918, the date of the insured's induction into the Army (R. 28), and interest at 8 percent, totalling \$1,328 on both claims

from May 1, 1918, to March 1, 1932, the date of the claim.

The claim of the administratrix of the estate of the other alleged creditor purported to be for board, lodging, laundry, etc., at \$75.00 per month over a period of ten months, from June 1, 1917, to May 1, 1918, six days after the insured entered the Army. It appeared, however, from one of the appellant's exhibits (R. 30) and the testimony of his attorney (R. 50) that the insured worked as a miner from some time during 1917 until he entered the Army, April 25, 1918, and that he had previously worked "for a while" during 1917 as a railroad fireman, i. e., that he was working during at least a substantial portion of the period during which, it was indicated by the creditors' claims, he was in need of care and unable to pay his board.

The record of the Montana court, offered in evidence by the appellant, concerning the allowances originally made on the claims (R. 35-39), does not indicate that the judge who made the allowances had before him any evidence in support of the claims except the affidavits of the two administratrices. The judge who made the realloances in 1940 had no additional evidence before him except the testimony of appellant's attorney (R. 43). The allowance by the first judge of \$748.00 on the claim (amounting to \$1,495.83, for board and lodging, etc.) of the administratrix of the estate of the creditor who died involved the disallowance of a sum sufficient only to eliminate the interest claimed in the amount of \$745.83, and an amount equal to less than one day's board and lodging, etc., at the rate charged by the claimant. Thus, the judge

left the insured's estate charged for board and lodging, etc., for more than five of the six days after the insured had entered the Army. The amount of appellant's claim disallowed was sufficient to eliminate \$200.00 of the \$1,200 claimed for nursing and money loaned and all of the amount claimed as interest (R. 38-39).

A fee of \$500.00 alleged to have been allowed jointly to the appellant and his predecessor in office, the administratrix, was for "extraordinary" as well as ordinary services to the estate² (R. 47). Appellant's attorney, in answer to a question on cross-examination as to what "extraordinary" services were rendered, testified that "several times" during the four years of her administration, the administratrix in order to appear in court at Butte, Montana, where the estate was being administered, traveled with her husband and the witness in the latter's automobile over roads which "weren't very good" between her home at Helena and Butte, and spent the night in Butte, appearing in court the next morning (R. 48-49). The witness also pointed out, in this connection, that expenses for travel, stationery, stamps and telegrams, had not been charged against the estate, but "which could be a very considerable sum if it were added up" (R. 49-50).

The services rendered by appellant's attorney to the estate (for which a fee of \$750.00 was allegedly al-

² There was no basis for an allowance for ordinary services, since the statute provided that commissions for such services should be based on "the amount of the estate accounted for" (Rev. C. Mont., 1935, sec. 10287), and there was no estate of the insured to be accounted for (R. 14).

lowed) apparently consisted almost entirely of efforts to collect the insurance from the Government³ (R. 43, 49-50). The attorney testified, it is true, that "for a period of three or four years beginning with 1930" he had made a search for property belonging to the insured. It appears from the evidence, however, that the insured had been a man without a home,⁴ kin (R. 28), or fixed occupation,⁵ and that he moved from place to place prior to his induction into the Army.⁶ The attorney, moreover, did not testify as to how much time and effort he had devoted to the search during the three or four years.

The Government objected to the introduction of records of the State court on the ground, *inter alia*, that they were incompetent, that the allowances contained therein were not conclusive in the instant case. (R. 33, 34, 40.) The court below admitted

³ Congress has limited the amount of fees for such services to "\$10.00 in any one case" except where insurance has been recovered by court action (when a fee not exceeding 10 percent of the amount recovered may be allowed by the court), and has imposed a penalty upon the receipt of a fee in excess of that amount (Section 500, World War Veterans' Act, 1924, as amended, 38 U. S. C. A. 551).

⁴ According to his Army record (R. 32), he gave as his "Emergency address; Mrs. Ella Johnson—friend, care of Broadway Cafe, Butte, Mont." It was Mrs. Johnson's administratrix who filed the claim on behalf of her estate for board, lodging, laundry, etc.

⁵ During the year he lived in Butte before entering the Army he had worked first as a railroad fireman and then as a miner (R. 30, 50-51).

⁶ He was born in Canada (R. 30), and before moving to Butte had lived for "some months" in Great Falls, Montana (R. 51).

the records subject to the objection (R. 34, 42), but later in an opinion (R. 78-87) rejected them as incompetent (R. 84).

The court admitted in evidence (R. 54), over appellant's objection (R. 55), the record of a former suit in the court below to recover all of the insurance covered by the policy, which had been brought by the administratrix of the insured's estate (appellant having been later substituted for her) and two other persons (R. 56-78). This record contained an order of District Judge Bourquin sustaining the demurrer to an amended complaint because it failed to allege that the persons joined as plaintiffs were in fact the heirs of the insured, having alleged merely that they had been so adjudged by a State court in a preceeding to which the United States was not a party. This adjudication, Judge Bourquin held, was not binding on the United States (R. 70). The complaint in that suit was later amended by adding the missing allegations as to heirship (R. 72). A demurrer was again sustained (R. 78), but apparently for insufficiency of the allegations as to the existence of a "disagreement" (R. 77) essential to the court's jurisdiction. The subsequent judgment of dismissal for failure to amend (inadvertently omitted from the printed record herein—see App. Br. p. 2), was concededly not on the merits. The court below made it clear in its opinion that it left undecided the question of whether it was bound by Judge Bourquin's holding in the instant case, and stated merely that it concurred therein, and regarded the rule announced

thereby as applicable to the allowances of creditors' claims and administration charges in the instant case (R. 83-84).

Both sides moved for judgment in the court below (R. 52-53). The court entered findings of fact, conclusions of law (R. 88-89) and judgment for the Government, dismissing the action on its merits (R. 90), and subsequently denied (R. 97-98) motions (R. 91-97) of appellant, in effect, for additional findings that the allowances were made in the State court and conclusively established that insurance in the amount of such allowances would not escheat under Montana law (R. 92-94), that the judgment for the Government should, accordingly, be set aside and a judgment entered for appellant, or, in the alternative, that a new trial should be granted (R. 95-97).

QUESTIONS PRESENTED

1. Where the existence and amount of any liability on the part of the Government to pay insurance proceeds to the estate of a deceased insured depends on whether and in what amount any assets in the insured's estate would escheat under the laws of the State of his residence, and where the existence and amount of such escheat depends upon the existence and amount of any debts or administration expenses properly chargeable against the estate, whether the probate court in which the estate is being administered lacks the power to bind the State and the Government on the matter of escheat by an order settling an account filed by the administrator and

directing payment of allowances on creditors' claims and for administration expenses from any assets in the estate, in view of the facts that there were no assets in the estate when the order was issued and that neither the State nor the Government were parties to the proceedings.

2. Whether, in any event, insufficient notice was given in the instant case of the proceedings in the probate court to bind either the Government or the State under State law.

3. Whether a Federal court, in order to decide the issue as to the Government's liability in a war risk insurance case involving the question of escheat, may determine whether there are any debts or administration expenses properly allowable against the insured's estate, without taking over or interfering with the administration of the estate by the probate court.

4. Whether, in any event, a probate court lacks the power to bind the Federal courts with respect to the liability of the Government, by an order allowing and directing the payment of an attorney's fee, receipt of which by the attorney would constitute a violation of a Federal penal statute.

5. Whether the court below properly admitted in evidence the record of the former suit in that court, and whether, in any event, no harm to the appellant resulted from that ruling.

SUMMARY OF THE ARGUMENT

The portions of the record of the probate court offered in evidence by the appellant were properly excluded and judgment was properly entered for the Government.

1. The alleged allowances and order as to debts and administration expenses by the probate court (contained in the portions of the record), upon which appellant solely relies, could not prejudice the rights of the United States or the State of Montana in the matter of escheat.

(a) The effects thereof, if any, upon the rights of the Government or the State are governed by a provision of the Uniform Declaratory Judgments Act of Montana, that all persons with an interest which would be affected by a declaratory judgment should be made parties to the proceedings, and that no declaration should prejudice the rights of any stranger thereto.

(1) The alleged allowances and order were declaratory since there were no assets in the estate upon which they could operate, and they would not be effective unless and until the estate should acquire sufficient assets.

(2) Both the Government and the State had interests which would be affected by the declaration, since, if both were bound thereby, appellant would be entitled to recover from the Government in the instant case and the State would be precluded from claiming that the amount so recovered would escheat.

(b) Since the Government and the State were not parties to the proceedings, the rights of neither could be prejudiced thereby.

(c) In any event, it does not appear that the State or the Government received notice of the proceedings sufficient to bind either of them under State law.

2. Rejection by the court below of the allowances and order of the probate court would not involve interference with or taking over the probate of the estate by a Federal court.

3. The United States should not be bound by the allowance of the attorney's fee made by the probate court, in any event, since the result would be to compel the United States to furnish the funds for the payment of a fee prohibited by one of its penal statutes.

4. The court below did not commit reversible error in admitting in evidence the record of the former suit in that court.

ARGUMENT

The portions of the record of the probate court offered in evidence by the appellant were properly excluded and judgment was properly entered for the Government

The findings of fact of the court below (R. 88-89) (which appellant does not dispute (Br. 9)), that the insured died a resident of Montana, intestate and without known heirs, fully support its conclusion of law (R. 89) that none of the insurance was payable to the estate of the insured in view of the provisions of 38 U. S. C. A. 514, that "when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States * * *."⁷ Appellant places his sole reliance upon the alleged existence of debts of the insured and administrative expenses which, if properly allow-

⁷ Portions of the argument in the appellant's brief (Br. 10-11, 14) are wholly in accord with this view but contrary in effect as to the first statement in his argument (Br. 10).

able against his estate, would have priority, in the amount thereof, over a claim of escheat on behalf of the State of Montana to any assets the estate might acquire.

In the amended complaint appellant properly assumed the burden of proving the existence of such debts and expenses (R. 13-15, 20-21), but, in order to meet that burden at the trial, relied exclusively upon the portions of the record of the State Court offered in evidence by him relating to the allowances and the order settling an account, filed by him as administrator, and directing him as such to pay such allowances from "any" assets in the estate (R. 46). His position is, in effect, that the allowances and order, regardless of lack of merit, are conclusive on the State of Montana and thus establish exemption from escheat to that State, in the amount of such allowances, of any assets the estate might acquire; and that they are also conclusive on the Government as to such exemption. It is submitted that the court below properly rejected this evidence, and that, therefore, appellant failed to make out a case for recovery.

1. The alleged allowances and order could not prejudice the rights of the United States or the State of Montana.

(a) The effects (if any) of the alleged allowances and order upon the rights of the Government or the State are, we submit, governed by a provision of the Uniform Declaratory Judgments Act of Montana (Rev. C. Mont. 1935, c. 90, Sec. 9835.11):

When declaratory relief is sought, all persons shall be made parties who have or claim any

interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

(1) Unlike the usual allowances and orders settling accounts of administrators, the allowances and order on which appellant sought to rely were merely declaratory, since there were no assets in the estate upon which they could operate. "The distinctive characteristic of the declaratory judgment is that the declaration stands by itself; that is to say, no executory process follows as of course." *Kariher's Petition No. 1*, 284 Penn. 455, 463, 131 A. 265, 268. See also *Sheldon v. Powell*, 99 Fla. 782, 793, 128 So. 258, 263; *Ferris v. Phoenix Life Insurance Company*, 272 N. Y. Supp. 782, 784. The law of Montana requires that upon settlement of the account of an administrator the court must make an order for the payment of the debts "as circumstances of the estate require" (Rev. C. Mont. 1935, S. 10311), and that when such an order is made "the administrator is personally liable to each creditor for his allowed claim and execution may be issued on such order as upon a judgment in court, in favor of each creditor, * * * The administrator is liable therefor on his bond to each creditor" (*Ibid.* S. 10313). Manifestly no such liability arose upon the issuance of the order in the instant case. The source of payment was specifically limited by the order itself to "any assets in the estate", and as there were no assets in the estate at the time the order was issued, it could plainly not be effective unless and until the estate should acquire sufficient assets to comply with the order. Its

declaratory nature is, therefore, obvious. That the Declaratory Judgments Act embraced such an order, moreover, is shown by the following provisions of another section thereof (*Ibid.* S. 9835.4):

Any person interested as * * * administrator or * * * creditor in the administration of * * * the estate of the decedent * * * may have a declaration of rights or legal relations in respect thereto;

* * * * *

(b) To direct * * * administrators * * * to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any questions arising in the administration of the estate * * *.

(2) It is obvious that both the Government and the State of Montana had interests which would be affected by the declaration since, if both were bound thereby, appellant would be entitled to recover from the Government in this suit insurance in the amount of \$4,004.59, and the State would be precluded from claiming that the amount so recovered would escheat to it. (It should be noted in this connection that the State would not be bound by the decision of this Court in the instant case, since it is not a party thereto and the proceeding is not *in rem*.)

(b) Since neither the Government nor the State were parties to the proceedings, the rights of neither could be prejudiced by the allowances or orders, and the latter were therefore properly excluded from the evidence. In *Hastings v. United States*, 133 F. (2d) 218, 220 (C. C. A. 6th), which, as here, involved the

question of escheat of war risk insurance to the Government, it was held under a provision in the Declaratory Judgments Act of Tennessee, identical with the provision in the Montana statute, that the District Court correctly excluded a declaratory judgment to the effect that the estate of the insured would not escheat under Tennessee law, rendered by a Tennessee court in a proceeding to which the Government was not a party. That holding is, we submit, obviously applicable here.

(c) In any event, it does not appear that the State or the Government received notice of the proceedings in the probate court sufficient to bind either of them under the law of Montana. In order to make the order settling the account binding upon everyone, it was essential that the Clerk of the Court give notice of the hearing by posting notices in at least three public places in the County (Rev. C. Mont. 1935, S. 10299; *In re Davis' Estate*, 35 Mont. 273, 280, 88 Pac. 957, 958). Notices were posted in the instant case, and the United States Attorney received a notice by mail, but it was conceded, in effect, by appellant's attorney in the court below (R. 40-41) that he had the hearing continued until a later date and did not know whether further notice was given, by posting or otherwise, as to the new date for the hearing. Counsel for the Government denied that the Government received notice thereof (R. 40), and this denial is not disputed by appellant. The recital in the order settling the account that "due and legal" notice was given by the Clerk, by posting and mailing a copy to the United States Attorney, would not be conclusive

if contradicted by the record of the proceedings. *State ex rel. Regis v. District Court*, 102 Mont. 74, 55 Pac. (2d) 1295. Whether the record shows that no notice was given as to the date on which the hearing was held does not appear because appellant elected to offer only portions of the record in evidence. The presumption, therefore, arises that the recital in the order is refuted by portions of the record which he failed to introduce. If it were to be assumed, moreover, that notice was given, there is no indication that the contents thereof was sufficient to advise the State of Montana of its interest in the proceedings, i. e., that the purpose thereof was to enable the estate, which was otherwise without assets, to obtain insurance proceeds against which the State might claim an escheat. Unless the State were thus sufficiently advised of its interest, it could not, we submit, be bound by the order in question. Cf. *State ex rel. Regis v. District Court, supra*.

2. Contrary to appellant's suggestion (Br. 18), the rejection by the court below of the allowances and order of the State probate court did not, we submit, involve interference with or taking over the probate of the estate by a Federal court. Nor would there have been such interference or taking over if it had been necessary for the court below to make a determination as to the existence and amounts, if any, of debts and administration expenses, properly chargeable against the estate. Such a determination would not be effective to impair or set aside the allowances and order of the probate court in so far as it might differ from them. It would be effective

solely upon the decision in the instant case of the question as to the Government's liability under a Federal statute. Cf. *Smith v. United States*, 83 F. (2d) 631, 638 (C. C. A. 8th). If the State of Montana, a stranger both to the proceedings in the probate court and to the instant case, should challenge in the probate court the allowances and order in question for the purpose of claiming an escheat of insurance proceeds which would be received by the estate in the event of a recovery in the instant case, or of claiming escheat of any other assets the estate might later acquire, the probate court would obviously be free to set aside the allowances and order despite a determination by this Court that it and the court below were bound thereby in determining the question as to the Government's liability to the estate. And, similarly, a determination by this Court or the court below that there were no debts or administration expenses allowable against the estate and, hence, that no insurance was payable to it, would not preclude the probate court from adhering to its prior allowances and order in the event of a challenge thereof by the State for the purpose of claiming escheat of any assets, other than insurance, which the estate might acquire.

3. The United States should not be bound in this case by the allowance of the attorney's fee made by the probate court, in any event, since the result would be to compel the United States to furnish the funds for the payment of a fee, receipt of which by the attorney would, we submit, constitute a violation of one of its penal statutes. Cf. *Smith v. United States*,

supra. As previously shown,⁸ the services for which the fee was allowed, in the amount of \$750.00, were rendered almost entirely in connection with the claim for insurance. Section 500, World War Veterans' Act (38 U. S. C. A. 551), limits a fee for such services to \$10.00, and imposes a substantial penalty upon the obtaining of a fee in excess of that amount. *Hines v. Lowrey*, 305 U. S. 85.⁹ If appellant's attorney should receive the fee in question, this statute would we submit, plainly be violated. Manifestly the United States should not be compelled to furnish the money for that purpose.

4. *Brown v. United States*, 65 F. (2d) 65 (C. C. A. 9th), upon which appellant so heavily relies (Br. 11-13), is manifestly distinguishable from the instant case, since the questions here presented were not before this Court in that case.

5. The court below did not commit reversible error in admitting in evidence (R. 54) the record of the former suit in that court to recover the full amount of the insurance under the policy here in suit (R. 56-78), which, as previously indicated in the Statement of the Case, was introduced merely to bring before the court an opinion rendered by Judge Bourquin on sustaining a demurrer to the complaint. It was not necessary to introduce this record, since the court below could have taken judicial notice thereof. *United States v. Pink*, 315 U. S. 203, 216. No prejudice, moreover, resulted to appellant, since the

⁸ Statement of the Case, *supra*, p. 1.

⁹ The full text of the section is contained in Note 1 to the Supreme Court's opinion.

court below left undecided the question whether it was bound by Judge Bourquin's holding, stating merely that it concurred therein and regarded the rule announced thereby as applicable to the instant case (R. 83-84). Indeed, appellant does not contend that there was any prejudice, since he does not pray for a new trial in the event that his prayer for judgment should be denied (Br. 20).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed. In this connection, appellant, while praying this Court for a judgment in his favor, does not ask in the alternative for a new trial (Br. 20). Unless, therefore, this Court should determine that he is entitled to judgment on the record as it stands, the judgment for the Government should, we submit, be affirmed.

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JULY 1944.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN R. HALEY, as Administrator of the Estate of George
Salter, deceased,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellant

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FILED

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United States

Circuit Court of Appeals

For the Ninth Circuit

JOHN R. HALEY, as Administrator of the Estate of George
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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellant

Counsel for Appellee in their brief question the sufficiency of our specifications of error to cover the rejection by the District Court of our proof of the allowance by the probate court of claims and administrative expenses.

There was no specific ruling upon this evidence, except as the judgment denied the sufficiency of all the evidence to make out a case for plaintiff.

We thought we had the point sufficiently covered, and argued it at length in our brief. We still think it is covered, especially by Specification No. 9.

However, in case the Court should deem it material, we ask to add a specification, No. 4½, to read as follows:

“4½. The District Court erred in holding plaintiff's proof of claims and administration expenses insufficient and in rejecting such proof.”

REPLY TO APPELLEE'S ARGUMENT

Appellee seems to have abandoned the theory urged by it in the trial court that the government is exempt from the payment of this insurance under the provisions of Sections 454a and 514, Title 38, U. S. C., as we find no reference to it in counsel's brief.

We gather from counsel's brief that the following propositions are urged:

I.

That the trial court must pass upon creditor's claims and administration expenses in the first instance,—in other words, take over the functions of the state probate court.

II.

That in some way, not clear to us, the Montana Uniform Declaratory Judgments Act of 1935 has some bearing upon this case.

III.

That the allowance of attorneys' fees by the probate court covers the same services which are being rendered in this suit, for which a fee is asked, and is violative of the penal provisions of Section 551, Title 38, U. S. C.

We will discuss these points in the order stated.

I.
CREDITORS CLAIMS, ETC.

This proposition is fully covered in our original brief, and we stand upon the argument and the citation of authorities contained in that brief.

Counsel question the service of notice upon the United States Attorney of the hearing of the matter of attorneys' and administrator's fees in the probate court.

We agree with Judge Bourquin when he said that the government is not required to appear in the probate court. Any issue of which the Federal Court has jurisdiction must be tried in the Federal Court.

This means that the Federal Court is not empowered to take part in the probate proceedings. Under the provisions of Section 514, Title 38, U. S. C., the money is to be paid to the estate of the deceased soldier, and become assets of his estate as of the instant of his death, "to be distributed as his general estate is distributed," which includes the determination and payment of debts and expenses of administration.

Brown vs. U. S.,
65 Fed. (2nd) 65.

This suit was brought and has been prosecuted in strict conformity with the provisions of Section 445, Title 38, U. S. C., and other applicable Federal statutes; and the probate of the estate has been conducted in strict accordance with the state laws governing the probate of the estates of intestates; and under the statutes and authorities cited in our original brief the insurance is payable to appellant to the extent of the legal claims and expenses of administration as determined by the probate court.

II.

UNIFORM DECLARATORY JUDGMENTS ACT

We cannot see any connection between the Uniform Declaratory Judgments Act and the estate of George Salter. No action under that statute has ever been brought by anyone interested in the Salter estate, and moreover the Montana Declaratory Judgments Act was passed by the Montana legislature on February 13th, 1935, more than four years after the first appointment of an administrator of the Salter estate, on August 11, 1930 (R. 12), and more than two years after the allowance of the creditors' claims in 1932 (R. 37, 39).

Chapter 16, Laws of 24th Session, 1935.

What questions might have arisen had the Uniform Declaratory Judgments Act been in force and had a proceeding under that Act been initiated are purely academic so far as the instant case is concerned.

III.

ATTORNEYS' FEES, ETC.

Counsel for appellee attempt to bring the fees of the attorneys as allowed by the probate court under the provisions of Section 551, Title 38, U. S. C., which limits fees for the presentation and adjudication of claims under the insurance contract to \$10.00.

This provision has no reference to claims in suit, either before or after payment. The concluding portion of Section 551 provides for an attorney's fee, in case of suit, which shall not be more than 10% of the amount recovered.

The fees allowed and paid for the administration of the estate after the insurance has been paid to the estate

are for the determination of the probate court, and are not limited or affected by the \$10.00 limitation. If the attorney's fees were so limited, so those of the administrator would also be limited; but neither is affected in any way by that limitation.

These questions have been raised for the first time on this appeal, so that there has been no previous occasion to notice them.

The probate court held hearings, and made its findings as the result of those hearings (R. 42 et seq.). It is to be noted that it trimmed down the creditors' claims over \$2275.00.

The allowance of attorneys' fees was made under the authority of Section 10,285, Montana Rev. Codes of 1935, and are a claim against the estate.

McLure's Estate,
68 Mont. 556, 569,
220 Pac. 527.

The order allowing the attorneys' fees is based upon the value of the services shown at the hearing to have been rendered to the estate.

Had the \$10.00 limitation been applicable to the fees in the estate the point would certainly have been raised in this Court in *Brown vs. U. S.*, 65 Fed. (2nd) 65, or by the Supreme Court in *Singleton vs. Cheek*, 284 U. S. 493, 76 L. ed. (U. S.) 419, or *Pagel vs. Pagel*, 291 U. S. 473, 78 L. ed. (U. S.) 921.

In the *Brown* case there was practically no other property than the insurance, and in the *Pagel* case the claims and costs amounted to about \$3800.00, with but little

other property than the insurance, and no mention is made of this point.

The \$10.00 provision of Section 551 applies alike to insurance and compensation claims. There are thousands of estates of veterans under guardianship to which both compensation and insurance are being regularly paid, and in which the Veterans Administration scrutinizes the accounts of guardians, and regularly approves the periodical allowance of attorneys' fees and guardians' fees far in excess of the \$10.00 limitation. This of course does not change the meaning of the law, but is conclusive evidence that the Veterans Administration does not consider that it applies to the administration of money after claim allowed and payment made.

While the point has not been mentioned by counsel for appellee, we call the Court's attention to the fact that the allowance of \$500.00 to the administrators is apparently somewhat in excess of the power of the probate court under the provisions of Section 10287 of the Revised Codes of Montana of 1935.

That Section allows administrators 7% of the first \$1000, and 5% of the next \$9000 of the value of the property handled by the administrator, and permits the allowance of additional compensation for extraordinary services, but provides that "the total amount of such extra allowance must not exceed the total amount of commission allowed by this section."

This provision seems to be jurisdictional so far as extra allowances are concerned, and applying the practice followed by this Court in the Brown case, the Court would

undoubtedly be justified in cutting down the administrator's fees so that they would not be more than the probate court could allow under this section.

It was deemed necessary that these fees and those of the attorney should be fixed in advance of judgment in this case. At the time they were fixed the plaintiff was claiming the full amount of the insurance, or \$10,000.00, and it is evident that this amount was taken into consideration by the probate court.

After the order fixing fees was made, however, the absence of heirs having been developed, the plaintiff filed his amended complaint for the sum of \$4004.59, but the fact that this reduction in the amount sued for would affect the administrators' fees was not noted, and has not been mentioned by counsel for appellee, either in their brief here or in the Court below.

Interest is allowed on approved claims as upon judgments (Sec. 10,174 Mont. Rev. Codes, 1935). Judgments draw 6% interest until paid (Sec. 7729, Mont. Rev. Codes 1935).

The creditors' claims allowed amount to \$1748.00, upon which there has now accrued over \$1200.00 of interest. Attorneys' fees and costs totalling \$908.81 were allowed, to which must be added the legal allowance to the administrators. These amounts now total more than \$4000.00. Taking that figure as a basis, the statutory allowance to the administrator would be \$220.00, which the probate court had the power to double, making \$440.00. This would make the allowance of \$500.00 to the administrators slightly more than the court is permitted to allow under the statute.

However, when all the accrued interest on the claims and the allowance to the administrators is taken into account the amount accounted for by the administrators would warrant an allowance nearly as great as the amount shown in the order of allowance (R. 47).

We mention these matters here somewhat in detail as they will become pertinent in the event this Court reverses the judgment.

IN GENERAL

While we have not tried to answer separately the suggestions made here and there throughout Appellee's brief, they all fall under some of the three classifications above.

The two theories of this case seem to be as follows:

Appellant contends, consistently with the ruling of this Court, that the probate of the estate is within the exclusive jurisdiction of the state district court.

The Appellee, however, contends that the probate of the estate must be had in the Federal Court, and that all matters arising in the estate are to be passed upon originally by the Federal Court, which would necessarily mean that any judgment would run in favor of the individual claimants; notwithstanding the statute (Sec. 514, Title 38, U. S. C.) requires that the money be paid to "*the estate*", and stops there.

Every matter involved in this appeal, with the exceptions herein noted, has been fully covered by our opening brief, and we are standing upon the argument and citation of authorities contained in that brief.

While we confess that we do not understand that the informal conclusion at the end of appellant's brief is to be considered as a pleading, yet, taking note of Appellee's criticism, and in case it should make any difference to anyone, we revise the prayer in our original brief and ask that the judgment of the District Court be set aside and judgment as prayed for in the complaint be entered, with modifications as suggested herein, or in the alternative that the judgment be set aside and plaintiff granted a new trial.

Respectfully,

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Attorneys for Appellant.

No. 10739

United States
Circuit Court of Appeals
For the Ninth Circuit.

SPRECKELS-ROSEKRANS INVESTMENT
COMPANY, a Corporation,

Appellant,

vs.

JOHN V. LEWIS, former Collector of Internal
Revenue, of the United States for the First
District of California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

MAY 25 1944

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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7th and Mission Streets
San Francisco, California

Attorneys for Defendant and Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 22309W

SPRECKELS - ROSEKRANS INVESTMENT
COMPANY, a corporation,

Plaintiff,

vs.

JOHN V. LEWIS, former Collector of Internal
Revenue of the United States for the First District of California.

Defendant.

COMPLAINT TO RECOVER INCOME TAXES
ILLEGALLY COLLECTED

Plaintiff complains of defendant, and for cause of action alleges: [1*]

I.

Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Nevada and duly licensed and authorized to do business in the State of California; that at all of said times and at the date of the filing of this complaint, plaintiff had its principal place of business and resided at No. 2 Pine Street, in the City and County of San Francisco, State of California, and in the Southern Division of the Northern District of California.

*Page numbering appearing at foot of page of original certified Transcript of Record.

II.

Defendant, John V. Lewis, was at all times from July 5, 1933, to March 6, 1938, inclusive, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First District of California.

III.

This is an action for the recovery of income taxes erroneously and illegally collected under the Revenue Act of 1936, Act of June 22, 1936, c. 690, 49 Stat. 1648-1756.

IV.

Heretofore and on March 15, 1937, plaintiff filed with defendant as Collector of Internal Revenue of the United States for the First District of California, its income tax return for the calendar year 1936, upon the form furnished by the Commissioner of Internal Revenue of the United States for that purpose. Said return showed an income tax due from plaintiff for said calendar year 1936 in the amount of \$18,724.38, which amount plaintiff paid to defendant as Collector of Internal Revenue of the United States for the First District of California in installments as follows: On March 15, 1937, the sum of [2] \$4,681.11; on June 15, 1937, the sum of \$4,681.11; on September 9, 1937, the sum of \$4,681.10 and on December 23, 1937, the sum of \$4,681.06.

V.

In the income tax return filed by plaintiff with defendant as alleged in paragraph IV hereof, plaintiff reported net taxable income in the amount

of \$87,145.81. Included in said net taxable income were gains from sales of capital assets, as defined in the Revenue Act of 1936, in the amount of \$34,250.70. Said amount of \$87,145.81 was the correct net income of plaintiff for said year 1936 for the computation of corporate income tax as required by said Revenue Act of 1936, except that plaintiff failed to deduct therefrom before computing said taxes, a loss sustained by plaintiff from the sale in said year of 300 shares of the capital stock of Chase National Bank, arising from the transactions hereinafter set out.

VI.

On March 3, 1930, plaintiff purchased 100 units, each unit consisting of one share of the capital stock of Chase National Bank and one share of the capital stock of Chase Securities Corporation for the sum of \$17,050.00. On April 8, 1930, plaintiff purchased 100 units, each unit consisting of one share of Chase National Bank stock and one share of Chase Securities Corporation stock, for the sum of \$16,546.25. On April 24, 1930, plaintiff purchased 100 units, each unit consisting of one share of Chase National Bank stock and one share of Chase Securities Corporation stock, for the sum of \$17,100.00, or a total of 300 units at a cost of \$50,696.25. At the time of the purchase of said units the shares of Chase National Bank and Chase Securities Corporation were not separately transferable; [3]

thereafter on June 14, 1934, said stock was reissued in separate certificates, plaintiff receiving new certificates for 300 shares of Chase National Bank stock and new certificates for 30 shares of Chase Securities Corporation stock, the name of said Chase Securities Corporation being changed to Amerex Holding Corporation. At the times of the purchase of said units of Chase National Bank and Chase Securities Corporation stock, as hereinabove alleged, 70% of the cost of said 300 units or \$35,487.38 was allocable to and represented the cost of said 300 shares of Chase National Bank stock, and 30% of the cost of said 300 units or \$15,208.87 was allocable to and represented the cost of the 300 shares of Chase Securities Corporation stock. On December 22, 1936, plaintiff sold said 300 shares of Chase National Bank stock for a total price of \$13,482.15. As a result of the sale of said 300 shares of Chase National Bank stock on December 22, 1936, plaintiff sustained a loss of \$22,005.23, which loss, as hereinbefore alleged, was not deducted in its income tax return filed with the defendant as hereinabove alleged.

VII.

The correct income tax liability of plaintiff for the year 1936, after deducting the loss upon the sale of said 300 shares of Chase National Bank stock was and is the sum of \$13,353.82, and plaintiff has overpaid its said income tax for 1936 in the sum of \$5,370.56.

VIII.

On March 13, 1940, plaintiff filed with the Collector of Internal Revenue at San Francisco, California, its claim for a refund of income taxes illegally collected from plaintiff for the calendar year 1936 in the sum of \$5,370.56, said refund claim was based on the ground that plaintiff had overpaid its [4] income taxes for said year 1936 in said sum of \$5,370.56 by reason of its failure to deduct the loss sustained upon the sale of 300 shares of Chase National Bank stock on December 22, 1936, amounting to \$22,005.23 as hereinabove alleged. A copy of said claim for refund is attached hereto marked Exhibit "A", and is hereby referred to and by such reference made a part hereof as fully as though set forth herein at length.

IX.

On October 2, 1940, said claim for refund filed as alleged in paragraph VIII hereof was rejected and disallowed in full by the Commissioner of Internal Revenue. Notice of the rejection and disallowance of said claim for refund was mailed to plaintiff by registered mail by said Commissioner on October 2, 1940.

X.

No part of the amount claimed by plaintiff as a refund of income tax as alleged in paragraph VIII has been repaid, nor has the same been credited upon plaintiff's liability for income tax, and that the whole thereof, together with interest thereon as allowed by law, is wholly due and owing from defendant to plaintiff and unpaid.

Wherefore, plaintiff prays judgment against the defendant for the sum of Five Thousand Three Hundred Seventy and 56/100 (\$5,370.56) Dollars, together with interest thereon as provided by law, and for plaintiff's costs of suit herein.

WALTER SLACK,

Attorney for Plaintiff. [5]

State of California,

City and County of San Francisco—ss.

John N. Rosekrans, being duly sworn, deposes and says: That he is an officer, to wit: the Vice President of Spreckels-Rosekrans Investment Company, a corporation, the plaintiff named in the foregoing Complaint to Recover Income Taxes Illegally Collected, and as such is duly authorized to and does make this verification in its behalf; that he has read said Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

JOHN N. ROSEKRANS.

Subscribed and sworn to before me this 16th day of September, 1942.

[Seal] MARION CURTIS,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires: Aug. 12, 1945.

[Endorsed]: Filed Sept. 17, 1942. [6]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant above named and answers the complaint on file herein as follows:

I.

Defendant admits the allegations of Paragraphs I and II of the complaint.

II.

Answering the allegations of Paragraph III, defendant denies that the taxes were erroneously or illegally collected.

III.

Defendant admits the allegations of Paragraph IV of the complaint. [7]

IV.

Answering the allegations of Paragraph V of the complaint, defendant denies that plaintiff sustained a loss during the year 1936 from the sale during said year of 300 shares of the capital stock of Chase National Bank. Defendant denies that plaintiff erred in failing to deduct from its income tax as reported in its return the amount of the alleged loss in the sale of said capital stock. Saving for these denials, defendant admits the allegations of Paragraph V.

V.

Answering the allegations of Paragraph VI of the complaint, defendant denies the allegation that at the time of the purchase of said units of Chase

National Bank and Chase Securities Corporation, 70% of the cost of said units was allocable to and was representative of the cost of the shares of Chase National Bank, and denies the allegation that 30% of the cost of said units was allocable to and was representative of the cost of said shares of Chase Securities Corporation stock. Denies the allegation that upon the sale of 300 shares of Chase National Bank on December 22, 1936, plaintiff sustained a loss of \$22,005.23. Saving for these denials defendant admits the allegations of Paragraph VI.

VI.

Defendant denies the allegations of Paragraph VII of the complaint.

VII.

Answering the allegations of Paragraph VIII, defendant denies that the taxes referred to in said paragraph were illegally collected. Admits that a true copy of plaintiff's claim for refund is attached to the complaint as Exhibit "A". Defendant denies that said claim for refund was just or that [8] the basis relied on in said claim for refund was correct. Defendant admits the remaining allegations of Paragraph VIII.

VIII.

Defendant admits the allegations of Paragraph IX of the complaint.

IX.

Answering the allegations of Paragraph X of the complaint defendant denies that any part of

said claim for refund is due or owing from defendant to plaintiff, or otherwise. Admits that no part of said claim has been paid by the defendant or by any one in his behalf.

Wherefore defendant prays for judgment in his favor, for his costs and for such other relief as may be just.

FRANK J. HENNESSY,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States At-
torney.

(Receipt of Service.)

[Endorsed]: Filed Nov. 19, 1942. [9]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel that the following facts may be taken to be true for the purpose of the above-entitled proceedings without prejudice to the right of either party to introduce other or further evidence at the hearing not inconsistent therewith.

I.

That plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Nevada and duly

licensed and authorized to do business in the State of California; that at all of said times and at the date of the filing of this complaint, plaintiff had its principal place of business and resided at No. 2 Pine Street, in the City and County of San Francisco, State of California, and in the Southern Division of the Northern District of California. [10]

II.

That defendant, John V. Lewis, was at all times from July 5, 1933 to March 6, 1938, inclusive, the duly appointed, qualified and acting Collector of Internal Revenue of the United States for the First District of California.

III.

That this is an action for the recovery of income taxes collected from the plaintiff under the Revenue Act of 1936, Act of June 22, 1936, c. 690, 49 Stat. 1648-1756.

IV.

That heretofore and on March 15, 1937, plaintiff filed with defendant as Collector of Internal Revenue of the United States for the First District of California, its income tax return for the calendar year 1936, a copy of said return is attached hereto, made a part hereof and is marked Exhibit A. Said return showed an income tax due from plaintiff for said calendar year 1936 in the amount of \$18,-724.38, which amount plaintiff paid to defendant as Collector of Internal Revenue of the United States for the First District of California in installments as follows: On March 15, 1937, the sum

of \$4,681.11; on June 15, 1937, the sum of \$4,681.11; on September 9 1937, the sum of \$4,681.10 and on December 23, 1937, the sum of \$4,681.06.

V.

That said income tax return, referred to in paragraph IV hereof, showed a net taxable income in the amount of \$87,145.81. In arriving at said sum of \$87,145.81 plaintiff did not take as a deduction any part of the sum of \$22,005.23, which plaintiff claims but defendant denies is the deductible loss resulting from the sale of 300 shares of the capital stock of the Chase National Bank. [11]

VI.

That the said Chase National Bank was incorporated in 1877 under the laws of the state of New York. In 1917 the Chase Securities Corporation was incorporated under the laws of the state of New York. The said Chase Securities Corporation was formed to deal in certain securities in which the said Chase National Bank, was forbidden by law to deal.

VII.

Pursuant to an agreement dated March 21, 1917 (Exhibit B) a special dividend of \$2,500,000 was declared by the said The Chase National Bank of the city of New York and by appropriate action the said money was transferred to the said Chase Securities Corporation in return for the issuance of all of its capital stock pro rata to the stockholders of the said The Chase National Bank of the city of New York; and the stockholders of

the Chase National Bank of the city of New York and the Chase Securities Corporation deposited their shares of stock of each corporation with the Bankers Trust Company and received in exchange therefor deposit receipts which in each case covered the same number of shares of the Chase National Bank of the city of New York and of Chase Securities Corporation. In due course, pursuant to the said agreement the holders of the aforesaid deposit receipts surrendered the same and received certificates of stock of the Chase National Bank of the city of New York and of the Chase Securities Corporation, on opposite sides of one paper as per form (Exhibit C) submitted herewith and made a part hereof. The said agreement provided for its modification, amendment or termination "at any time and from time to time, by the vote of the registered holders of at least seventy-five per cent. (75%) of the number of shares of the Bank of the Securities Company." On January 15, 1930, the said agreement of March 21, 1917 was amended by the vote of the registered holders of at least seventy-five per cent. (75%) of the number [12] of shares of the Bank and Securities Company, so as to permit the further amendment or termination thereof by the vote of the registered holders of sixty-six and two-thirds per cent. (66⅔%) of the number of shares of the Bank and of the Securities Company, instead of seventy-five per cent. (75%) as originally.

See Exhibit F, which is attached hereto and made a part of this stipulation.

VIII.

That under the said agreement of March 21, 1917 (Exhibit B) and until June 14, 1934, the stock of the said Chase National Bank and the stock of the said Chase Securities Corporation could not be purchased or sold separately, but could be sold only in units consisting of one share of the stock of said Chase National Bank and one share of the stock of the said Chase Securities Corporation. Neither the stock of the said Chase Securities Corporation nor the stock of the said Chase National Bank was prior to June 14, 1934 quoted on the market or sold separately. The quotations on the market with respect to stock interests in these corporations was in terms of a share of stock of the Chase National Bank of New York. The bid for such a share of Chase National Bank of New York constituted the price bid, asked or paid for a unit of stock consisting of one share of said Chase National Bank stock and one share of said Chase Securities Corporation (later called Chase Corporation) stock. The bid and asked price of the said units of stock representing the interests in said Chase National Bank stock and said Chase Securities Corporation stock during the month of June 1934 were as follows:

Date 1934	No. of Shares Sold	Open	High	Low	Close	Bid	Asked
June 1						27	281½
2						27	281½
3	Sunday						
4						271¼	283¼
5						281¼	293¼
6						283¼	301¼

Date	No. of						
1934	Shares Sold	Open	High	Low	Close	Bid	Asked
7						281½	30
8						29	30½
9						29¼	30¾
10	Sunday						
11						28¾	30¼
							[13]
12						29	30½
13						28¾	30¼

The above statistics are taken from the Bank Stock Market, New York, for the month of June 1934 as shown by the Wall Street Journal.

The bid and asked prices of Chase National Bank of New York, Common Stock for the month of June 1934 were as follows:

Date	No. of						
1934	Shares Sold	Open	High	Low	Close	Bid	Asked
June 14						x 27½	29
15	(new)					27¾	29¼
16						27¾	29¼
17	(Sunday)						
18						27½	29
19						26¾	28¼
20						26½	28
21						26¼	27¾
22						26	27½
23						26¼	27¾
24	(Sunday)						
25						26	27½
26						26	27½
27						26¼	27¾
28						26½	28
29						26¼	27¾
30						26	27½

x Without Amerex Corporation formerly Chase Corporation. The above quotations are taken from the Bank Stock Market as shown by the Wall Street Journal.

IX.

That the bid and asked prices of Amerex Holding Company capital stock in the Over-the-Counter Market as shown by the National Stock Summary (April 10, 1934 to October 10, 1934, page 65) is as follows:

Name of Broker	Date	Bid	Asked
Julius Stern & Co., N. Y.	6/15/34	100 @ 13½	100 @ 14¼ E
W. F. Thompson & Co., N. Y.	6/15/34	200 @ 13½	200 @ 14¼ E
Greene & Co., N. Y.	6/16/34	100 @ 13¾	100 @ 14¼ E
G. L. Chrtsrom & Co., Inc., N. Y.	(6/21/34)	@ 14	@ 14 E
Hewitt & Co., N. Y.	6/27/34	100 @ 14¾	100 @ 15⅛ E

Key—E, National Daily Quotation Service—Eastern Sheets.

X.

That by a certain agreement dated June 14, 1934, copy of which is submitted herewith and marked Exhibit D, as a consequence [14] of the passage of the Federal Banking Act of 1933, requiring the separation of National Banks and their affiliates, the aforementioned agreement of March 21, 1917, as amended, (see Exhibit B) was terminated. As a part of the said agreement of June 14, 1934, the certificate of incorporation of the Chase Securities Corporation was changed by eliminating therefrom all provisions preventing separate sale, pledge or other disposition or transfer of a share or shares of stock thereof or interest therein, without transfer to the same transferee of a like interest in an equal number of shares of the said Chase National Bank of the city of New York. Also on June 14, 1934, the number of shares of the Chase Corporation stock

was reduced so that each 10 shares of stock of said corporation then issued and outstanding became only one share of the stock of the said corporation. On the same date, June 14, 1934, the name of said Chase Corporation was changed to Amerex Holding Corporation. On and after June 15, 1934, but not prior thereto, the stock of the said Amerex Corporation was quoted separately from the stock of said Chase National Bank stock.

XI.

That the 300 shares of the capital stock of the Chase National Bank referred to in paragraph V above was acquired by plaintiff as follows: On March 3, 1930, plaintiff purchased 100 units, each unit consisting of one share of the capital stock of Chase National Bank and one share of the capital stock of Chase Securities Corporation, for the sum of \$17,050.00. On April 8, 1930, plaintiff purchased 100 units, each unit consisting of one share of Chase National Bank stock and one share of Chase Securities Corporation stock, for the sum of \$16,546.25. On April 24, 1930, plaintiff purchased 100 units, each unit consisting of one share of Chase National Bank stock and one share of Chase Securities Corporation stock, for the sum of \$17,100.00, or a total of 300 units at a cost of \$50,696.25. As evidence of said purchase, plaintiff received a certificate or certificates representing the [15] said 300 units, which in each case consisted of one paper upon the face or one side of which was set forth an executed certificate for the stock of the Chase National Bank

of the City of New York, together with a subjoined legend with reference to the provisions of a certain agreement of March 21, 1917 as amended and upon the back or other side of which was set forth and executed a certificate for the stock of Chase Securities Corporation, together with a legend stamped thereon with reference to the provisions of said agreement of March 21, 1917 as amended. A true copy of a specimen form for said certificate and legends stamped thereon is submitted herewith and marked Exhibit C. True copy of said agreement of March 21, 1917 and of the amendment thereto is submitted herewith and marked Exhibit B. On December 22, 1936, plaintiff sold the said 300 shares of Chase National Bank stock for a total price of \$13,482.15.

This is to Certify that

is the owner of Twenty Dollars each of the Capital Stock of The Chase National Bank of the City of New York, transferable only in the books of the Bank by the holder to any person or by duly authorized Officers, upon the surrender of this Certificate properly endorsed

THE AGREEMENT OF MARCH 21, 1917, AS AMENDED BETWEEN ALL THE SHAREHOLDERS OF THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK AND CHASE SECURITIES CORPORATION, TO WHICH THE ABOVE-ENTITLED CERTIFICATE IS ISSUED, AND THE CHASE SECURITIES CORPORATION, AS INCORPORATED UNDER THE LAWS OF THIS STATE, PROVIDES THAT NO SHAREHOLDER OF EITHER CORPORATION WILL SELL, PLEDGE OR OTHERWISE DISPOSE OF OR TRANSFER, WHETHER VOLUNTARILY, BY OPERATION OF LAW OR OTHERWISE, ANY SHARE OR INTEREST THEREIN IN EITHER CORPORATION WITHOUT AT THE SAME TIME TRANSFERRING TO OR VESTING IN THE SAME PARTY AN EQUAL NUMBER OF SHARES, OR THE SAME INTEREST THEREIN, IN THE OTHER. ALSO THAT SUCH SHAREHOLDER WILL NOT TRANSFER ANY OF SUCH SHARES, OR ANY INTEREST THEREIN, TO ANY OTHER PERSON OR ENTITY UNLESS THE SAME IS DONE IN CONNECTION WITH THE INCORPORATION OF CHASE SECURITIES CORPORATION AND AS STATED IN THE STOCK CERTIFICATE OF THAT CORPORATION ON THE REVERSE SIDE HEREOF

Witness the pursuant and of the Bank and the signatures of its duly authorized officers

(Signed)

SPECIMEN

REPRESENTATIVE OF THE BOARD

SPECIMEN

INSTRUMENT LAMINATED

No. 22309-a
 Exhibit No. 9
 Filed June 30, 1943
 Walter B. Mallory, Clerk
 J. B. Schaeffer

XII.

That on March 13, 1940, plaintiff filed with the Collector of Internal Revenue at San Francisco, California, its claim for a refund of income taxes collected from plaintiff for the calendar year 1936 in the sum of \$5,370.56, said refund claim was based on the ground that plaintiff had overpaid its income taxes for said year 1936 in said sum of \$5,370.56 by reason of its failure to deduct the loss now claimed in this action to have been sustained upon the sale of 300 shares of Chase National Bank stock on December 22, 1936, amounting to \$22,005.23 (as hereinabove recited). A copy of said claim for refund is attached hereto marked Exhibit E, and is hereby referred to and by such reference made a part hereof as fully as though set forth herein at length.

PLAINTIFF'S EXHIBIT E

United States (Cut) of America
Treasury Department
Washington

December 4, 1942.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of \$5,370.56 Corporation Income Tax for 1936, (with statement and schedules attached) filed by Spreckels-Rosekrans Investment Company, San Francisco, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal]

A. H. MARKS

F. A. Birgfeld

Actg. Chief Clerk, Treasury
Department.

Treasury Department Stock Form 2247

[In Longhand]: WWB wwB HSF SSF JPW H24

Free

Form 843

Treasury Department

Internal Revenue service

Revised June 1930

CLAIM

To be Filed with the Collector where Assessment
was made or tax paid

[In pencil]: 1938—Jan—530002

[In pencil]: 1937—401908

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reserve side.

[Stamp]: 8574822	[X] Refund of Tax Illegally Collected	Collector's Stamp
	[] Refund of Amount Paid for Stamps	(Date received)
	Unused, or Used in Error or Ex-	Received
	cess.	Mar 13 1940
	[] Abatement of Tax Assessed (not	Collector of Int.
	applicable to estate or income taxes)	Rev., First Dist.
		Calif.

State of California
City and County of San Francisco—ss.

[Stamp] :
Received
Apr 24 1940
Claims Control
Section

Type Name of taxpayer or
purchaser of stamps:

✓

Spreckels-Rosekrans Investment Company

or Business address: 2 Pine Street, San Francisco,
(Street) (City)

Print California
(State)

Residence.....

Te deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete.

1. District in which return (if any) was filed: San Francisco, California. [In pencil]: 1st ✓ ✓
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1936, to Dec. 31, 1936.
3. Character of assessment or tax: Corporation Income Tax.
4. Amount of assessment \$18,724.38; dates of payment Mar. 15, June 15, Sept. 15, Dec. 23, 1937.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded..... \$5,370.56 ✓
7. Amount to be abated (not applicable to income or estate taxes) \$.....
8. The time within which this claim may be legally filed expires, under Section 322 (b) of the Revenue Act of 1936, on March 15, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

See Schedule attached

[Stamp]: Revenue Agent in Charge Received May 29,
1940 San Francisco.

(Attach letter-size sheets if space is not sufficient)

SPRECKELS-ROSEKRANS INV. CO.

Signed JOHN N. ROSEKRANS,
 V. Pres.

Sworn to and subscribed before me this 12th day of March,
1940.

[Seal]

MARION CURTIS

(Signature of officer administering oath)

Notary Public in and for the City and County of San Francisco,
State of California.

(Title)

My Commission Expires June 27, 1941.

[In pencil] : M

CERTIFICATE

[In pencil] : G PM 9-20-40 CER

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax :

Character of assessment and period covered	List	Year	Month	Account No. or Page Line	Amount assessed	Paid, Abated, or Credited Date	Pd. Ab. Cr.	Pd.	Pd.	Pd.	Pd.	Claim No.
	1937	1936		401908	\$18,724.38	3/15/37		\$4,681.11				
						6/15/37		4,681.08				
						9/18/37		4,681.10				
						12/27/37		4,681.09				
	1938	1936	Jan.	530002	6.16	12/27/37		6.16				
Totals,					\$18730.54	Total,		\$18,730.54				

I certify that the records of this office show the following facts as to the purchase of stamps :

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state :	
						Serial number	Period commencing—
[Stamp] : Rejected						26374	

CLIFFORD C. ANGLIM
Collector of Internal Revenue
First California
(District)

By J. P. ROESMAN, Dep. Col.
Committee on Claims

Certificate—(Continued)

Claim examined by—

Amount claimed.... \$.....

Claim approved by—

Amount allowed.... \$.....

Chief of Division.

Amount rejected.... \$.....

INSTRUCTIONS

1. The claim must be set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return, and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Spreckels-Rosekrans Investment Company purchased for investment unit certificates representing 300 shares of Chase National Bank stock and 300 shares of Chase Securities Corporation stock on the dates and at the prices listed below:

March 3, 1930	100 units	\$17,050.00
April 8, 1930	100 "	16,546.25
" 24, 1930	100 "	17,100.00
<hr/>		<hr/>
Total	300 "	\$50,696.25

[Stamp]: Received Mar 13 1940 Collector of Int. Rev.
First Dist. Calif.

The shares of the two corporations were not at the time separately transferable.

On June 14, 1934, Chase National Bank and its securities affiliate Chase Securities Corporation were divorced as required by law, and separate certificates were issued to the holders of the unit certificates for their equity in Chase Securities Corporation. The latter corporation was at the same time renamed Amerex Holding Corporation. Each unit certificate holder received one share of Amerex Holding Corporation stock for each ten units held. Spreckels-Rosekrans Investment Company as the holder of 300 units received 30 shares of Amerex Holding Corporation stock.

On December 22, 1936, Spreckels-Rosekrans Investment Company sold its 300 shares of Chase National Bank stock for a total price of \$13,482.15. Subsequent to such sale but before filing its Federal Income Tax return for the calendar year 1936, the attention of the officers of tax payer was directed to

a ruling of the Commissioner of Internal Revenue relating to the tax status of this stock, as reported by the president of Amerex Holding Corporation in a letter to stockholders dated October 5, 1934. This reported ruling was in part as follows:

“In case only the shares of the Bank are sold and the shares of this corporation (Amerex) are retained, or in case the shares of this corporation are sold and the shares of the Bank are retained:

If the proceeds exceed the cost of the unit, the excess is profit, and the cost of the shares retained is zero; when the shares retained are subsequently sold, the net proceeds are profit; If the proceeds do not exceed the cost of the units no profit is realized and no loss is sustained, and the cost of the shares retained is the cost of the unit reduced by the proceeds of the shares sold; when the shares retained are subsequently sold, if the proceeds exceed the reduced cost, the excess is profit and if the proceeds are less than the reduced cost, the difference is loss.”

While not admitting the validity of this ruling the officers of this corporation decided that the 1936 corporation Income Tax return should be prepared in conformity therewith, and inasmuch as the 30 shares of Amerex stock had not been sold, no loss was claimed on the sale of the Chase Bank stock. Changes in tax law introduced by the Revenue Act of 1937 made such treatment exceedingly unfavorable to this corporation.

This taxpayer contends that it is appropriate and feasible to make a fair allocation of the cost of the Chase Bank units between the Chase National Bank stock which was sold and the Amerex Holding Corporation stock which was retained. In support of this contention taxpayer relies upon the decision of the Board of Tax Appeals in *Stanley Hagerman v. Commissioner*, (34 BTA 1158) affirmed by the Third Circuit Court of Appeals, (102 Fed 2nd 281) in which the taxpayer was permitted to make an allocation of cost between the stock of a bank and that of its securities affiliate on the basis of net asset values of each company at the date units were purchased.

There is submitted herewith, (schedule #1), a comparative statement of the reported earnings of the Chase National Bank and Chase Securities Corporation, by years, for the six years 1924 to 1929 inclusive, with the calculated percentage of the earnings of each company to the total earnings of both companies. It will be seen that for the entire six year period the percentages of earnings are as follows:

Chase National Bank	70.110%
Chase Securities Corporation	29.890%

There is also submitted, (schedule #2), a comparison of the Net Worth, at December 31, 1929, of the Bank with that of the Securities Company, as reported by those companies. This percentage is as follows:

Chase National Bank	70.455%
Chase Securities Corporation	29.545%

Since there was no change in the capital structure of either Bank or Securities Company from December 31, 1929, to the dates on which taxpayer purchased the stock units, it may be assumed that the relative values of the two stocks remained substantially the same during the interval.

The taxpayer feels justified in allocating the cost to it of the unit certificates between the shares of stock of the two companies, on the basis of such computed relative percentages of earnings and net worth. Accordingly the following allocation of cost is claimed:

Cost of 300 units, consisting of 300 shares of Chase National Bank stock and 300 shares of Chase Securities Corporation stock.....	\$50,696.25
<hr/>	
Cost allocated to 300 shares Chase National Bank stock (70%)	\$35,487.38
Cost allocated to 30 shares of Amerex Holding Corporation stock (30%).....	\$15,208.87

If a cost of \$35,487.38 is allocated to the 300 shares of Chase National Bank stock sold by the taxpayer in the year 1936, a Capital Loss of \$22,005.23 would result from such sale, and taxpayers Net Income for the year 1936 would be reduced from \$87,145.81, as reported, to \$65,140.58.

Taxpayer accordingly requests the Commissioner to re-determine its income tax for the year 1936, and to cause the over-payment of tax, amounting to \$5,370.56 (as computed on schedule #3, attached hereto) to be refunded.

Schedule #1

SPRECKELS-ROSEKRANS INVESTMENT COMPANY
#2 Pine St., San Francisco, Calif.

Year 1936

Chase Securities Corporation

Comparative Earnings by Years
1924 to 1929 Inclusive

	Bank		Securities Corporation	
	Amount	% of Total	Amount	% of Total
1924	\$ 49,546.84	75.037	\$ 16,743.29	24.963
1925	49,164.74	63.300	28,504.21	36.700
1926	60,264.30	62.261	36,528.24	37.739
1927	80,703.75	69.897	34,757.08	30.103
1928	95,235.96	67.181	46,524.98	32.819
1929	183,041.71	76.013	57,760.83	23.987
	<u>\$517,957.30</u>	<u>70.110</u>	<u>\$220,818.63</u>	<u>29.890</u>

Schedule #2

SPRECKELS-ROSEKRANS INVESTMENT COMPANY
#2 Pine St., San Francisco, Calif.

Year 1936

Chase National Bank & Chase Securities Corporation

Comparison of Net Worth at December 31, 1929

Chase National Bank

Capital	\$105,000,000.	
Surplus	105,000,000.	
Undivided profits	31,364,145.	
	<u>\$241,364,145.</u>	70.455%

Chase Securities Corporation

Capital stock\$ 73,000,000.

Surplus and undivided profits 28,216,620.

\$101,216,620.

29.545%

100.000%

Schedule #3

SPRECKELS-ROSEKRANS INVESTMENT COMPANY

#2 Pine St., San Francisco, Calif.

Year 1936

Computation of Federal Income Tax, Year 1936,
on Net Income as Adjusted

Normal Tax

Net income for income tax computation per

return\$87,145.81

Deduct:

Loss on sale of 300 shs. Chase National

Bank stock 22,005.23

Net income for income tax computation

(adjusted)\$65,140.58

Less: Dividends received credit (85% of

item 12a) 76,771.99

Normal tax net income(loss) \$11,631.41

Total Normal Tax

None

Surtax on Undistributed Profits

Net income for surtax computation, per

return\$87,145.81

Deduct:

Loss on sale of 300 shs. Chase National

Bank stock 22,005.23

Net income for surtax computation (ad-

justed)\$65,140.58

Less: Normal tax, etc.	None
Adjusted Net Income (item 28).....	\$65,140.58
Less: Dividends paid credit, etc.....	None
Undistributed net income (item 33).....	\$65,140.58

	Rate		
Tax on portion of item 33, not in excess of 10% of item 28.....	\$ 6,514.05	7%	\$ 455.98
Tax on portion of item 33, in excess of 10% and not in excess of 20% of item 28	6,514.06	12%	781.69
Tax on portion of item 33, in excess of 20% and not in excess of 40% of item 28	13,028.12	17%	2,214.78
Tax on portion of item 33, in excess of 40% and not in excess of 60% of item 28	13,028.12	22%	2,866.19
Tax on portion of item 33, in excess of 60% of item 28.....	26,056.23	27%	7,035.18
Total Surtax	\$13,353.82		
Total Normal Tax and Surtax.....	\$13,353.82		
Income Tax Assessed and Paid.....	\$18,724.38		
Amount of Refund Claimed	\$5,370.56		

[Endorsed]: Plaintiff's Exhibit E. Filed June 30, 1943. Walter B. Maling, Clerk, by J. A. Schaertzer, Deputy Clerk.

XIII.

That on October 2, 1940, said claim for refund filed as stated in paragraph XII was rejected and disallowed in full by the Commissioner of Internal Revenue. Notice of the rejection and disallowance of said claim for refund was mailed to plaintiff by

registered mail by said Commissioner on October 2, 1940. [16]

XIV.

That no part of the amount claimed by plaintiff as a refund of income tax as stated in paragraph XII has been repaid, nor has the same been credited upon plaintiff's liability for income tax.

XV.

That in the event decision should be rendered in favor of the plaintiff the parties hereto shall compute the amount due, in accordance with the decision of the court, and the amount so arrived at will be inserted in the judgment.

Dated: June 22, 1943.

WALTER SLACK

Attorney for Plaintiff

FRANK J. HENNESSY

United States Attorney

ESTHER B. PHILLIPS

Assistant United States At-
torney

[Endorsed]: Filed June 30, 1943. [17]

[Title of District Court and Cause.]

Washington, D. C.

Monday, June 7, 1943

DEPOSITION OF THOMAS C. MONTGOMERY,
taken without formal notice by mutual agreement of
the parties, before Franklin A. Steinko, a Notary
Public in and for the District of Columbia, in Room

4311 Department of Justice Building, Washington, D. C., beginning at 10:00 o'clock a.m., when were present:

Thomas M. Wilkins, Esq.,

Counsel for Plaintiff;

George J. Laikin, Esq.,

Counsel for Defendant.

PROCEEDINGS

Mr. Wilkins: The parties to this proceeding have stipulated to take the deposition of Thomas C. Montgomery in Washington, D. C. It has been informally agreed between Mr. Laikin and myself that we appear here in Mr. Laikin's office in [18] the Department of Justice to take the deposition of Mr. Montgomery on this, the 7th day of June, 1942. Without objection, therefore, I will proceed with the examination of Mr. Montgomery. That is agreeable, is it?

Mr. Laikin: It is.

Thereupon,

THOMAS C. MONTGOMERY,

a witness produced by Counsel for the Plaintiff, was duly sworn by the Notary Public and, upon examination, testified as follows:

Examination on Behalf of the Plaintiff

By Mr. Wilkins:

Q. Will you give your full name, Mr. Montgomery?
A. Thomas C. Montgomery.

(Deposition of Thomas C. Montgomery.)

Q. And your business address?

A. Washington Building, Washington, D. C.

Q. Your age? A. Fifty-three.

Q. Your primary education?

A. High school; A.B. degree, LL.B. degree Harvard, 1914.

Q. Did you ever practice law?

A. From 1914 to 1917, in South Carolina.

Q. What experience have you had since the practice of law?

A. I was in the Army in World War I, more or less in a business job in Paris; then I went in the securities business in March, 1920. I have been in it ever since.

Q. Will you describe your experience in dealing in securities since 1920?

A. Well, I started as everyone does, as a salesman. I was with a firm in Atlanta, Georgia, at first, from 1920 to '21. [19]

Q. What is the name of that firm?

A. Securities Sales Company.

Q. And what was your position?

A. Salesman.

Q. How long were you there?

A. Not quite a year.

Q. And then where did you go?

A. To the Equitable Trust Company, New York.

Q. And what did you do there?

A. Salesman.

Q. Securities salesman?

A. Yes, securities.

(Deposition of Thomas C. Montgomery.)

Q. And then where did you go?

A. I was in Houston, Texas, for three months; I went to institute a bond department for the Guardian Trust Company of Houston.

Q. Were you employed there?

A. I was manager of the bond department.

Q. And what were those dates?

A. That was from September to December, 1921.

Q. Where did you go from there?

A. From there I went to New York and Washington. I was working on some private promotions for a few months. Then I went into the mortgage business here in Washington, and was in that for four years.

Q. What company were you with then?

A. Real Estate Mortgage and Guaranty Corporation.

Q. You say you were there four years?

A. Four years.

Q. Where did you go after you left there? [20]

A. I, with another man, formed Waggaman, Brawner & Company, to deal in investment securities generally, and I was an officer and partner in that firm from 1927 until last September.

Q. Did that firm own a seat on the Washington Stock Exchange? A. Yes.

Q. And what is your present affiliation?

A. Last summer my partner there went into the Army and I moved down as a consequence with the firm of Ferris Exnicios & Company. We merged the two businesses. Mr. Ferris lost his

(Deposition of Thomas C. Montgomery.)

partner Exnicios and we merged the two businesses under that name.

Q. During any of that time was it your business to appraise or place a value on stocks for others?

A. Oh yes, naturally, in the course of the business.

Q. Have you had occasion to appraise the value of bank stocks during that time? A. Yes.

Q. Would you say that that formed any large percentage of your work?

A. Well, from the early part of 1930 on it did. Up to that time I hadn't been especially interested in bank stocks any more than any other class of stocks, because in the boom days they sold for such high figures that the average investor wasn't interested in a stock anywhere from two or three hundred dollars a share up.

Q. Then, from 1930 on, did you commence dealing particularly with bank stocks?

A. Yes. Since that time I have dealt in bank stocks right along. I have watched the market especially on the New York bank stocks, the leaders like Chase, National City, Manufacturers, Irving Trust, and so on. [21]

Q. How about securities companies, investment companies? Have you had experience with valuing the capital stock of that sort of property?

A. Yes. Of course in the early days the shares of securities companies were generally not publicly held. In more recent years the two that I have dealt in have been First Boston and Blair & Com-

(Deposition of Thomas C. Montgomery.)

pany, which are about the only two that are very actively traded.

Q. Have you ever been a member of any stock exchange?

A. Yes, I am a member of the Washington Stock Exchange.

Q. In the course of your business, have you ever had occasion to inquire into the value or make a study of the value of the common stock of the Chase National Bank of New York City?

A. Yes, I have.

Q. Have you ever had occasion to inquire into the value or make a study of the value of the Chase Securities Corporation? A. Yes.

Q. Are you familiar with the values of those securities as of the early part of the year 1930?

A. Yes.

Q. Are you familiar with the details of the agreement resulting in a device between the shares of the Chase National Bank stock and the shares of the Chase Securities Corporation stock forbidding the sale of either without an equal number of shares of the other?

A. Yes. Such an agreement was made March 21, 1917, when Chase Securities was started. It was terminated June 14, 1934. Originally this agreement provided——

Mr. Laikin: Well, now, I will object to testimony as to what the agreement provided. It is in the record and it will [22] speak for itself.

(Discussion off the record.)

(Deposition of Thomas C. Montgomery.)

Mr. Wilkins: At this point, without objection from Mr. Laikin, I will read into the record a list and description for purposes of identification of certain exhibits that will be attached to a stipulation that we have about agreed to between us.

Exhibit "B" will be a copy of agreement between depositing stockholders of the Chase National Bank of the City of New York and A. Barton Hepburn, Francis L. Hine, Henry W. Cannon and Albert H. Wiggin as a committee of such stockholders, providing for the organization of Chase Securities Corporation, dated March 21, 1917. It is this agreement which limits the sale of Chase National Bank stock and Chase Securities Corporation stock.

Exhibit "C" will be a copy of a certificate of the stock of the Chase National Bank, with a copy of a certificate of Chase Securities Corporation stock printed on the opposite side of the same piece of paper.

Exhibit "D" will be an agreement dated June 14, 1934, terminating the part of the agreement dated March 21, 1917, forbidding the sale of Chase National Bank stock and Chase Securities stock separately.

By Mr. Wilkins:

Q. Mr. Montgomery, having in mind that during the period from March 21, 1917, to June 14, 1934, the common stock of the Chase National Bank of New York City was transferable only in units consisting of an equal number of shares of such stock

(Deposition of Thomas C. Montgomery.)

and shares of stock of the Chase Securities Corporation, have you an opinion concerning the value on March 3, 1930, April 8, 1930, and April 24, 1930, of the common stock of the said Chase National Bank independently of any value that might be attributable to the [23] stock of the Chase Securities Corporation? A. Yes, I have.

Q. What, in your opinion, was such value per share of such common stock of the said Chase National Bank independently of the said Chase Securities Company stock on March 3, 1930?

Mr. Laikin: That question is objected to on the grounds that there has been no foundation laid for it. There is nothing in the record to indicate the facts or statistics by which the witness could base an opinion.

By Mr. Wilkins:

Q. Now, Mr. Montgomery, give your opinion as to the value on March 3, 1930, in accordance with the question.

A. I would say in my opinion the value of Chase stock on that day was \$127.88 per share—Chase Bank stock.

Q. Now give your opinion as to the value of such Chase National Bank stock, independently, on April 8, 1930.

Mr. Laikin: I object to this question on the same grounds as my previous objection.

By Mr. Wilkins:

Q. Will you answer the question, please?

(Deposition of Thomas C. Montgomery.)

A. On April 8, 1930, in my opinion the value of Chase Bank stock was \$124.10 a share.

Q. Now give your opinion as to the value of such Chase National Bank stock, independently, on April 24, 1930.

Mr. Laikin: Same objection.

A. In my opinion, on April 24, 1930, the value of Chase Bank stock was \$128.25 per share.

Q. In those opinions, that is the value of Chase National Bank stock in each instance independently of the Chase Securities Company stock on those days? [24]

A. Yes, sir; that is right.

Q. Will you describe briefly the method you followed in arriving at those values which you gave as your opinion?

A. On the nearest reported date to the dates of these purchases, December 31, 1929, the book value of Chase Bank and Chase Securities together was \$65.25 per share. Of that, the book value of Chase Bank alone was \$45.97. The book value of Chase Securities Company was \$19.28. In other words, the book value of the Securities Company was 31 per cent of the total book value. At the end of 1930 the book value of Chase Bank and Chase Securities taken together was \$63.02. The book value of Chase alone—Chase Bank alone—was \$48.35, and of Chase Securities was \$14.67. In other words, at the end of 1930 the book value of the Securities Company was 23 per cent of the total book value.

(Deposition of Thomas C. Montgomery.)

On dividends, to which I would give a good deal of weight, in the year 1927 the total dividends per share was \$18, of which the bank contributed \$14 and the Securities Company \$4. The same dividends were paid in 1928. In those two years the securities company was contributing approximately 22 per cent of the total income in dividends.

For the first three quarters of 1929 the total quarterly dividend was \$4.50 per share, of which the bank contributed \$3.50 and the securities company \$1.00. So, for '27, '28, and the first half of '29, the securities company contributed 22 per cent of the total income the shareholders received.

Then the stock, in July, '29, was split, five for one.

Q. What stock was that?

A. Both stocks, the Chase Bank and Chase Securities. In other words, a man who owned 100 shares before the split-up then had 500 of each.

[25]

From that time on, in the latter part of '29 up to the date of these purchases, the dividend basis was \$4 a year, of which \$3 was contributed by the bank and \$1 by the securities company.

In my judgment, an investor at that time would have been paying more attention to dividend income than he would to book value, because book value of a securities company fluctuates very violently.

Mr. Laikin: I will object to the answer and ask that it be stricken, on the ground that there is no showing that any of the information the witness is

(Deposition of Thomas C. Montgomery.)

giving was available to the ordinary investor. I will also ask to have the testimony of the witness with respect to the dividends paid by the bank and the securities company and the relative amount of each stricken, on the ground that there is no showing as to where the information and the statistics come from. There is nothing in the record on which the witness could base this testimony.

By Mr. Wilkins:

Q. Will you state for the record at this point, in connection with your answer to my last question, Mr. Montgomery, first whether or not the information that you used in connection with your study of these values came from the usual sources available to people who make the markets? A. Yes.

Mr. Laikin: I will object to the question as being indefinite and uncertain. The question is not valid unless he specifies the sources counsel has reference to.

Mr. Wilkins: It is merely a preliminary question.

By Mr. Wilkins:

Q. Now will you tell what were the sources of your [26] information?

A. The information was taken from Moody's Manual of Securities of Banks.

Q. Did you make any other investigations of information affecting your opinion?

A. I also checked the figures with Standard and Poor's.

(Deposition of Thomas C. Montgomery.)

Q. Did you have any other services from which you might have checked these figures?

A. There were others, but those are the two principal ones that all investment bankers use.

Q. Are these the sources of information upon which people buying and selling base their judgment?

A. Yes. The investor who wants to find the facts about a security can find them in those two services if it is any security that has any market at all.

Q. Will you proceed further, Mr. Montgomery, in giving your analysis of how you arrived at the opinions you have given us as to the values of these stocks?

A. In my opinion, an investor buying a bank stock, or in this case a bank and securities stock together, would look at the contribution of income from the bank and securities company and would look at the relative book values. But I, and I think the investor, would pay more attention to the dividend income, because, as I said earlier, the book value of a securities company fluctuates much more than the book value of a bank, which is relatively stable.

I find that the dividend income for about two and a half years preceding—I have given the figures, that 78 per cent came from the bank and 22 from the securities company. In the months immediately preceding the dates of purchase of this stock the [27] relative figures were 75 per cent

(Deposition of Thomas C. Montgomery.)

from the bank and 25 from the securities company. Therefore, I would say that in my opinion the investor was paying 75 per cent of his purchase for the bank stock and 25 per cent for the securities company, and that is the basis of my figures.

Q. Mr. Montgomery, if it had not been for the agreement of March 21, 1917, forbidding the separate sale of Chase National Bank stock and Chase Securities stock, what, in your opinion, would have been the values of Chase National Bank stock on the three days, March 3, 1930, April 8, 1930, and April 24, 1930?

Mr. Laikin: That is objected to on the ground that it poses a question the hypothesis of which is contrary to fact.

By Mr. Wilkins:

Q. You may proceed to answer that.

A. My opinion would still be the same. I would say that the value of Chase stock on those days would be the figures I have given.

Q. In your opinion, Mr. Montgomery, did the device accomplished by that agreement of March 21, 1917, forbidding the transfer of shares of these two corporations without an equal number of shares of the other, have the effect of increasing or diminishing the aggregate value of a unit consisting of the shares of both corporations?

A. I doubt if it would have any practical effect. There were times, possibly, when you would give more weight to the securities company and there were other times when you would give more

(Deposition of Thomas C. Montgomery.)

weight to the bank. As a matter of fact, from the dates of these purchases, in 1930, the relative value of the securities company went steadily down, and when the divorce finally took place in June of '34, the next day, when the stocks were traded [28] separately, the percentage of the total of the securities company was under five per cent, instead of twenty-five as, in my opinion, it was in the early part of 1930.

Q. I think, Mr. Montgomery, you misunderstood my question. My question is, whether this so-called locking device had the effect of increasing or diminishing the aggregate value of the two shares that were tied together; that is, whether the combination would be so advantageous that the value of both would be greater when locked together than separate, or whether the value of both would be less when locked together than the value of both separately. In your opinion, does the tying up of these two shares in one unit increase or diminish the aggregate value of both shares?

A. I don't think it generally speaking would increase or diminish the value.

Q. You were testifying a minute ago about the dividend yield on the two stocks over the years 1927 to 1929 inclusive, and the early part of 1930. You spoke of a split-up that occurred. Was that the only split-up that occurred between the beginning of 1927 and the end of 1930 between these two stocks?

(Deposition of Thomas C. Montgomery.)

A. That was the only what we call in the business a split-up. There were other mergers of Chase Bank where they took in other banks and trust companies and issued stock on those mergers, and after the dates of these purchases there was a big one which took place June 2, 1930, when the Equitable Trust Company and the Interstate Trust Company were merged in with Chase on the basis of four shares of Chase for five shares of Equitable and thirty-two one-hundredths Chase for each share of Interstate Trust Company.

Q. Then, in arriving at the dividend yields referred to for those years, did you take into consideration the effect of those [29] mergers and split-ups?

A. Well, when another bank was merged in, shares of Chase were issued to the stockholders of that bank pro rata on the assets that were taken in, so that I don't see that it had any great effect.

Q. How about the split-up that changed the ratio of shares of both Chase National Bank and Chase Securities Company? Did you take that into consideration with reference to the effect on the dividend yield?

A. After the split-up—go back; if a man had a hundred shares before the split-up and he got \$18 a year, after the split-up he had 500 shares and he got \$4 a share. He got, relatively, twenty dollars against eighteen. There was a slight increase.

Q. So that you took that into consideration in determining the yield that you testified with re-

(Deposition of Thomas C. Montgomery.)

spect to, and that particular split-up was the only split-up during that period?

A. There were some small stock dividends paid, but they did not amount to much.

Q. Did they affect the ratio of capital to earnings?

A. It would be simply an increase in the number of shares outstanding capitalizing the higher assets of the bank, which were increasing in that period, and the securities company.

Q. Did you take those into consideration, those stock dividends, in arriving at the ratio of dividends?

A. I don't see that it made any difference, because you got the same dividend in Chase Securities and the Chase Bank every time. The relative position of the investor wasn't changed.

When I spoke of the dividends per share, to carry it out, the stockholder who owned 100 shares of Chase Bank and Chase Securities was getting \$180 a year before the split-up and after- [30] wards he had 500 shares and got \$4 a share, so he got \$200 a year against \$180. I think that makes it a little clearer.

Mr. Wilkins: You may cross-examine.

Examination on Behalf of the Defendant

By Mr. Laikin:

Q. Mr. Montgomery, you have testified as to the relative book values of the shares of the bank and the securities affiliate. Do I understand that

(Deposition of Thomas C. Montgomery.)

you obtained information as to that from the services such as Moody's and Poor's?

A. That is right.

Q. Can you give us the editions from which you obtained the information?

A. The Moody's Manual is the 1931 Manual.

Q. And what did you find in Moody's 1931 edition?

A. I took the book value figures from that '31 edition, and the dividends.

Q. Did Moody's indicate a financial statement for the bank and a separate financial statement for the securities company? A. Yes.

Q. On the previous years that you have testified to, did Moody's indicate that information?

A. I didn't go back of the '31 Manual. That gave the dividend rates, and the book values, for the two dates published previously, at the end of 1929 and 1930.

Q. Did any of the services that you refer to give the respective earnings of the bank and the securities company?

A. Yes. Net per share of the securities company was given in 1928 as \$1.69; in 1929, \$1.46; in 1930, \$1.07.

Q. And what were the dividends declared that year by the securities company? [31]

A. In '28 the securities company paid \$4 a share; in '29 the securities company paid \$3 on the old stock and then 25 cents on the new.

(Deposition of Thomas C. Montgomery.)

Q. Can you give us a page reference and volume reference for the source of your information as to the earnings of the securities company?

A. No, I didn't bother to take them down. It was the Manual for 1931, under "Chase Bank," where you will find them.

Q. Do you have the information of the earnings of the bank for the same years?

A. Moody's didn't publish it. This is taken from Standard and Poor's, and I am quoting exactly: "Indicated earnings years ended December 31 (as computed by Standard and Poor's Corporation based on net changes in capital funds plus common dividends declared): 1927, \$16.14; 1928, \$15.87; 1929, \$3.49"—that is on the new stock, of course—"1930, not given (not ascertainable due to merger); 1931"—if you want to go further—"a deficit of \$5.20; 1932, a deficit of \$2.07; 1933, a deficit of \$5.47; 1934, a deficit of \$4.44; 1935, net income, \$1.81; 1936, net income \$2.23."

Q. Do you have the page reference and volume reference of the source of this information?

A. No. I didn't bother to take them down, Mr. Laikin. They are right there in my office in Standard and Poor's.

Q. Do I understand that the information which you have just given us is the earnings record of the Chase Bank, not as submitted by the bank but as computed by publishers of the service?

A. Yes. The bank did not publish at that time an earnings statement. The service arrived at it

(Deposition of Thomas C. Montgomery.)

just as they stated there, [32] by taking net changes in capital funds plus common dividends declared.

Q. So that at best it is the estimate of publishers of the service as to what the earnings of the bank were?

A. Yes, it is their estimate, because the bank didn't report.

Q. And that estimate may or may not be correct?

A. It is the commonly accepted practice in business to check bank earnings that way.

Q. But it may or may not be bank earnings that the bank would report?

A. The bank didn't report any.

Q. You have testified to the fact that the securities company earnings for the year we have been discussing were \$1.69 for 1928, \$1.46 for '29, and so forth, and that the dividends declared for 1928 were \$4 and in 1929 were \$3. Do you know where the funds for the declaration of the dividend came from, inasmuch as they were over and above the earnings?

A. Presumably out of surplus.

Q. Have you checked that?

A. No, I have not.

Q. Have you examined the statements of the securities company to know where the money used to pay dividends came from?

A. No, I have not.

Q. Incidentally, have you ever examined the books and records of the Chase Securities Company?

(Deposition of Thomas C. Montgomery.)

A. In the old days, when they were active, I used to look at their statements, yes.

Q. You looked at their published statements?

A. Their published statements, yes. [33]

Q. But you have never examined the books and records of the company itself?

A. I had no reason to.

Q. Have you ever examined the books and records of the Chase National Bank?

A. I never had occasion to.

Q. Whatever information you have about these companies is from published statements or information which services have given you?

A. Yes, Mr. Laikin. That is what, in the securities business, we use to pass judgment on securities.

Q. When you seek to pass judgment on securities in the securities business, you try to arrive at what you would consider to be the most intelligent or most valid opinion or appraisal or guess, let's say, of value, is that correct?

A. Yes. The securities business isn't an exact science, and it never will be.

Q. In other words, valuation that you seek to ascertain, let us say, for investment purposes, would not be exact in the sense of solving a problem by algebra or mathematics?

A. Oh, no; far from it.

Q. Nor would it be exact as a chemical formula would be exact?

(Deposition of Thomas C. Montgomery.)

A. No. You make your estimate of value and your customer buys or sells, and then later you find out definitely whether you were right or wrong by the action of the market.

Q. In other words, only through experience can you prove your problem?

A. That's right.

Q. So that if you were required to prefix your valuation [34] with mathematical or formula exactitude, could the methods which you have testified to here be used?

A. Will you repeat that question, please?

Q. If the conclusion which you were seeking required mathematical certainty, could you use the method to which you have testified?

A. You couldn't get mathematical certainty. The method by which I arrived at my conclusion was taking the percentage of the value of the bank and the securities company of the total value, which I estimate at that period was 75 per cent for the bank and 25 per cent for the securities company.

Q. You state that you have used the published balance sheets of the two companies, the bank and the securities company, as a basis for some of your estimates. It is true, isn't it, that the actual value of a company's assets may not be revealed by a financial statement?

A. That is possible, but in the case of a bank or securities company you have a much closer method of value than you would with an industrial company, for instance.

(Deposition of Thomas C. Montgomery.)

Q. Well now, let's take the securities company. Did the published statement which you examined contain a list of all the securities owned by the company?

A. No, they simply classified them as so much in government bonds, so much in other bonds, so much in stocks, and the market values as of that date, and those reports were certified to by reliable auditors.

Q. Did the public statement carry it at market value or at book value?

A. The securities company custom, in all securities companies, is to carry them at market value?

[35]

Q. And did you ascertain whether or not the published statements correctly reflected market value?

A. No. Again, as we do in business, I would take the word of one of several high-grade firms of auditors who passed on it.

Q. But your opinions were based upon the opinions of others?

A. Upon the reports of others.

Q. Similarly, with respect to the published statement of the Chase National Bank, did you have occasion to determine whether or not the securities owned by them were properly evaluated?

A. No.

Q. You simply accepted the statements as being correct?

(Deposition of Thomas C. Montgomery.)

A. You have to do that. You can't go to the bank dealing in securities and say, "I have a man who wants to buy 100 shares of Chase. I would like to look at your books." They would laugh at you.

Q. Mr. Montgomery, the first purchase of a Chase unit here by this plaintiff was made on March 3, 1930. Did you have available to you statements indicating the bank's affairs and the securities company's affairs as of March 3, 1930?

A. No. The nearest report would be the one from which I gave you the figures, that is, December 31, '29.

Q. The second purchase made by this plaintiff was April 8, 1930. Did you have available to you a statement of the bank or the securities company for April 8, 1930?

A. No. Still the only published figures would be the end of the preceding year.

Q. Similarly, the last purchase was made on April 24, 1930. Did you have available to you information as of that date? [36]

A. No more than before. They didn't publish those statements except semi-annually or annually.

Q. You have testified to the fact that the book values of a securities company fluctuate frequently.

A. Yes.

Q. And considerably. Do I understand that it could fluctuate from week to week?

A. Yes; if the general market was moving up or down it could.

(Deposition of Thomas C. Montgomery.)

Q. And similarly, then, it could fluctuate from day to day if the general market was moving up or down? A. Yes.

Q. Did you make any study of the market fluctuations between, say, January 1, 1930, and April 24, 1930, in order to correlate the information you had in the published statement with that obtaining on the dates of purchase?

A. I took only the two months in which the purchases were made. In the month of March, 1930, the high of the stock was 178 and the low was 158. In the month of April the high was 171 and the low was 164.

Q. But you made no attempt to correlate the values for the particular dates of the purchase?

A. No. It would be impossible, I would say.

Q. You say it would be impossible?

A. Impractical.

Q. Why would it be impractical?

A. Because you had no reports to go on except the reports issued at the end of the preceding year.

Q. Conceivably, if a statement had been issued on March 3, 1930, it would have varied or deviated from the statement published [37] as of the end of 1929?

A. It wouldn't have varied a great deal.

Q. But it might have varied?

A. It might have varied, yes.

Q. And similarly on April 8, 1930, the state-

(Deposition of Thomas C. Montgomery.)

ment published then might have varied from one published at the end of 1929?

A. It might have, but it wasn't published.

Q. And similarly for April 24, 1930?

A. Yes.

Q. So that actually the book values on the particular dates in question might have varied from the book value indicated by the last published statement?

A. They might have varied, but the securities business is a practical business and you take the last report you have and make your estimate and buy or sell accordingly.

Q. But if you were asked to make an estimate that would be mathematically certain, would that alter your judgment or would that alter the method you would use in attempting to arrive at such result?

A. My whole estimate here is based on the relative book values, the relative dividends paid, and I arrived in my opinion at what was the percentage to allot to the bank and the securities company, and that is a matter of opinion and it isn't mathematically exact.

Q. Then actually, of course, your estimates might be wrong to some slight degree as of the particular dates in question? A. Oh, yes.

Q. In other words, another investment man using the same figures might arrive at a value that might be a dollar or two more or less than the value you have indicated? [38]

(Deposition of Thomas C. Montgomery.)

A. Yes. That is what makes the difference in markets, difference of opinion.

Q. The Chase National Bank was considered a very strong bank, was it not? A. Yes.

Q. And its reputation and good will were among the best in the United States, were they not?

A. Yes.

Q. To what extent, in your opinion, did such good will of the Chase National Bank carry over to the Chase Securities Corporation?

A. Oh, I say that went along in the same way. The securities corporation was regarded highly in business as an affiliate of the Chase Bank.

Q. Assuming that this particular securities corporation were affiliated with a bank of lesser importance than the Chase National Bank, would such lesser affiliation have a downward effect on the valuation of the securities company stock?

A. Well, one of the things you look at in securities is management, and you would rate Chase management higher than you would some others.

Q. In other words, the good will of the Chase National Bank contributed very definitely to the valuation of the Chase Securities stock?

A. The bank and the securities company, because you couldn't trade them separately.

Q. In view of the influence of the affiliation of the Chase bank that you have just testified to, would you alter your previous statement made on direct examination that if there had been no tie-up or no

(Deposition of Thomas C. Montgomery.)

restriction against separate sale, that the [39] respective values of the Chase bank stock and the securities stock would not have been affected?

Mr. Wilkins: Pardon me right there. I think perhaps I would like to have you eliminate the word "tie-up", because my question and the answer related to the agreement forbidding the sale separately, and had nothing to do with management or affiliation or anything else. It had only to do with the restriction on the sale.

By Mr. Laikin:

Q. Actually, Mr. Montgomery, there was a tie-up in management between the Chase Bank and the Chase Securities Company? A. Oh, yes.

Q. And that was generally known to the public?

A. Yes.

Q. They were generally considered more or less as one organization, is that a fact?

A. Well, they were and they weren't. A man in my line of business would have more contact with the securities company. A man in the banking business would have more contact with the bank.

Q. But the investor knew that he was buying securities of a closely tied-up and affiliated set of companies, isn't that so?

A. Yes, he knew that.

Q. Under those circumstances would you not say that the tie-up with the Chase National Bank contributed very definitely to the value that the prospective investor would place upon the securities company stock?

(Deposition of Thomas C. Montgomery.)

A. Oh, I suppose so; yes.

Q. Can you say to what extent?

A. No; that is impossible to appraise.

Q. But such a carryover of good will would be reflected in [40] the selling price of the unit?

A. Yes, I would say it would be.

Q. That an investor or purchaser would tend to ascribe greater value to the securities company's stock because of its tie-up with the bank?

A. I think the investor of that time was buying a unit and he was paying more attention to Chase Bank than he was to the securities company.

Q. In your appraisal of the respective values have you taken into account the good will which you have just testified to would make for a situation in which the investor would pay more attention to the bank than to the securities company?

A. The bank's book values and bank's earnings are much more stable than book values and earnings of a securities company, so an investor, I would say, would give much greater weight to the book value and earnings of a bank than he would of the securities company.

Q. You testified on direct examination that you personally would give greater weight to the earnings of the securities company.

A. I would give greater weight to the income derived from the bank than the securities company.

Q. Then that would be square with what, what an investor would do who would pay more attention to the bank's situation?

(Deposition of Thomas C. Montgomery.)

A. I am giving my opinion. The value of the bank was 75 per cent and the value of the securities company was 25 per cent, and I think an investor at that time, considering book value and earnings and good will, would estimate it at about that way.

Q. Mr. Montgomery, assume that you were authorized by some client to sell as, if and when, severed from each other, the rights [41] to receive separate certificates from the bank stock and the rights to receive separate securities for the securities company stock. Could you have found any customer willing to buy the bank stock separate from that of the securities company, or the securities company separate from that of the bank stock?

A. Of course that is theoretical, but I would say yes.

Q. Was there any market for such fractional ownership in the non-severable securities?

A. No.

Q. There was no such market? A. No.

Q. So that in this particular instance the practice does not support the theory?

A. No, there was no way to trade them separately.

Q. Well now, do investors generally buy securities for which there is no market?

A. No, generally not. But there was a market for the combined stock. After they were separated there was a market for the separate stocks.

Q. Do you know whether at the particular dates

(Deposition of Thomas C. Montgomery.)

we have been discussing, the spring of 1930, the Chase National Bank was involved with the Fox Theaters enterprises? A. Yes.

Q. And do you know how much money the Chase National Bank had invested in these enterprises?

A. I don't remember now. I did at the time.

Q. It was a substantial sum, was it not?

A. Yes.

Q. Is \$75,000,000 about right?

A. I don't remember. [42]

Q. Do you know how that loan was carried on the books of the Chase Bank? A. No.

Q. Then you don't know how that substantial item was reflected in the published statements of the bank, do you?

A. No. It would be carried in the loan account.

Q. If it was carried in the loan account at face, that would bring about one valuation of the assets of the bank. If it were carried at less than face, it would bring about another, would it not?

A. Yes.

Q. You don't know, of course, which way it was carried?

A. No. As a matter of fact, it was charged down very considerably in the years afterward when, as I testified earlier, the Chase Bank showed a deficit.

Q. That was after these purchases had been made?

A. As that stock depreciated they charged it

(Deposition of Thomas C. Montgomery.)

down. It is the practice of a bank to charge an asset down when it diminishes.

Q. Similarly, do you know of any other large loans that the Chase National Bank had that were very shaky at that time?

A. No, I don't. There was conversation around the street about this Fox situation.

Q. And if there were such large loans, and if such large loans were actually carried at book value and so reflected in the published statements, and these loans were relatively valueless, that would affect the actual value of the Chase Bank stock, would it not?

A. Well, in the size of the Chase it might make a little difference, but as a matter of fact, at the time of these purchases that Fox Film situation looked fairly good [43]

Q. But if the statements did not reflect the actual value of the loans at the time, it would make some difference in the value of the bank stock?

A. It would make some difference, but I don't know how anybody in the investment business is going to find it out. You buy or sell the stock on the figures you get and on your judgment.

Q. In other words, unless you had the inside information you could not make an actual correct valuation of the Chase Bank stock, is that right?

A. You can make an approximate valuation, as you can on any bank stock, because any bank may have some sour loans, and most of them do, from time to time.

(Deposition of Thomas C. Montgomery.)

Q. Well now, in order to arrive at a more accurate valuation of the Chase Bank stock, I suppose you could appraise all of its assets and determine what the bank owes, and arrive at a difference in that way, isn't that so?

A. You are getting down to a fine point, Mr. Laikin, and it isn't done in the securities business.

Q. But that would be one method, assuming it were practicable?

A. If the bank would let you do that, which they won't.

Q. Then assuming in a situation like that of the Chase Bank that you were given permission to do that and you actually did make such an appraisal, and the stock was being sold on the market, you would still have to evaluate the good will of the bank, which may tend to change the market selling price as distinguished from the actual value of the stock, isn't that so?

A. Repeat that question again, please.

(The reporter read the pending question.)

A. Well, the good will, which means in the case of a bank [44] respect for its position in the business and its management, always enters into the valuation.

Q. And how would you evaluate such good will, then?

A. You can't put it in dollars and cents.

Q. All of these factors which we have discussed would have an effect upon the relative valuation of the bank stock and the securities stock when they were being sold as one unit, would they not?

(Deposition of Thomas C. Montgomery.)

A. They are bound to enter into it, and the investor would have to make a rough guess as to what he thought they were worth, but if he was going to buy the stock he would have to pay the market price for it and get both of them. They were on the open market and the investor had his choice and he could buy it or he could refuse to buy it.

Q. He would buy it as a unit, and he wouldn't be concerned as to what the respective value of that stock was of each unit?

A. He might or might not. Some would and some wouldn't. Some take a great deal of care with which they go into a situation.

Q. Incidentally, was it not about these exact dates that the Chase National Bank and other creditors of the Fox Film and Fox Theaters Company forced William Fox to sell his controlling interest in these companies? Do you know that?

A. I don't remember.

Q. Do you know whether or not the Chase National Bank advanced sums to the securities company to enable the securities company to pay the dividends it did?

A. I don't know, but I doubt that.

Q. You have never investigated that problem?

A. No. The securities company may have borrowed money from [45] the bank at times as all securities companies do, to carry some of its underwritings, but they had plenty of assets of their own.

(Deposition of Thomas C. Montgomery.)

Q. Where do you get the information from that the securities company had plenty of assets of its own?

A. From its statements in the Manual.

Q. Do you know to what extent the securities company owned securities that were being under-written by the Chase group?

A. No, that wasn't broken down.

Q. Do you know to what extent the securities company owned so-called "cats" and "dogs" that the Chase Bank might have sloughed off on them?

A. I wouldn't say—no, I don't know to what extent. I would say that that is a question that is impossible to tell.

Q. Do you know how much of the earnings of the Chase National Bank were attributable to its dealings with the securities company?

A. No.

Q. Or vice versa, how much of the earnings of the securities company were attributable to its dealings with the bank?

A. No. There is no report that would give you that.

Q. And would not all of this information have some bearing upon the relative values of the two securities?

A. It would if you could get it, but you couldn't get it so in buying and selling Chase stock at that period I will say again that you simply make as near an estimate as you could in a practical manner.

Q. In other words, what you were trying to do

(Deposition of Thomas C. Montgomery.)

for us this morning is giving us your very best and most intelligent guess or opinion as to what the relative values of these securities were?

A. I am giving you my most intelligent opinion as to what [46] they were at that time.

Mr. Laikin: That is all.

Further Examination on Behalf of the Plaintiff
By Mr. Wilkins:

Q. Mr. Montgomery, in actual practice, in making or measuring markets for securities, does the market give the exact effect of the values of such loans as that of the Fox Film loan, which you were just discussing on cross-examination?

A. No, it couldn't.

Q. In arriving at the opinion which you gave on your direct examination, did you give effect to the earnings or deficits of both companies as to which you testified on cross-examination?

A. Yes, I did, with the securities company. It paid dividends in 1930 and paid 50 cents in 1931 and nothing thereafter.

Q. Can you say what part mathematical certainty plays in the creation of market values of securities traded in those markets?

A. It doesn't play any part.

Mr. Wilkins: Your witness.

Mr. Laikin: I don't think I have any further questions.

THOMAS C. MONTGOMERY

[47]

CERTIFICATE OF NOTARY PUBLIC

I, Franklin A. Steinko, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in the action.

[Seal]

FRANKLIN A. STEINKO

Notary Public in and for the
District of Columbia

My Commission Expires January 31, 1946.

[Endorsed]: Filed June 30, 1943. [48]

[Title of District Court and Cause.]FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled case came regularly on for trial on June 30, 1943, before the above-entitled Court, the Honorable Louis E. Goodman presiding, the plaintiff appearing by its attorney Walter Slack, the defendant appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, represented by Esther B. Phillips,

Assistant United States Attorney, and a Stipulation of Facts having been filed and the deposition of one witness having been received in evidence, and the cause having been argued and submitted, the Court now makes the following [49]

FINDINGS OF FACT

I.

The Court refers to and incorporates herein as his findings the facts stipulated and shown in the Stipulation of Facts filed by the parties.

II.

The Court finds that plaintiff's original investment made in 1930 in the Chase National Bank and its affiliate, Chase Securities Corporation, was a single investment; and that in making said original investment on March 3, 1930, plaintiff did not then allocate any portion of the original cost to the shares of stock of the Chase National Bank and a portion to the shares of stock of Chase Securities Corporation.

III.

The court finds that it is neither reasonable nor practicable to allocate to each stock a portion of the amount of the original investment of the plaintiff.

From the foregoing facts the Court renders the following

CONCLUSIONS OF LAW

(1) That no loss is allowable on the sale of plaintiff's stock in Chase National Bank during the year 1936 until the whole original transaction is closed by sale of the stock of the affiliate corporation, Amerex Holding Corporation, formerly Chase Securities Corporation.

(2) That defendant is entitled to judgment in his favor, with costs as may be taxed.

Dated December 13, 1943.

(Receipt of Service.)

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed Dec. 13, 1943. [50]

In the Southern Division of the United States District Court for the Northern District of California

No. 22309-W

SPRECKELS - ROSEKRANS INVESTMENT
COMPANY, a corporation,

Plaintiff,

vs.

JOHN V. LEWIS, former Collector of Internal
Revenue of the United States for the First District of California,

Defendant.

JUDGMENT

The above entitled case having come on regularly for trial on June 30, 1943, before the above entitled Court, the plaintiff appearing by its attorney Walter Slack, the defendant appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, represented by Esther B. Phillips, and evidence, oral and written having been received, and the cause having been argued and submitted, and the Court having rendered his findings of fact and conclusions of law, it is hereby

Ordered, Adjudged and Decreed that the plaintiff take nothing by the complaint, and that the defendant recover its costs [51] in the sum of \$, the amount to be taxed under the rules of Court and inserted herein by the Clerk.

Dated December 18, 1943.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Dec. 18, 1943. [52]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That Spreckels-Rosekrans Investment Company, a corporation, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 18, 1943.

WALTER SLACK,
Attorney for Appellant.
Address: 433 California
Street, San Francisco 4,
California.

[Endorsed]: Filed Mar. 7, 1944. [53]

[Title of District Court and Cause.]

STATEMENT OF POINTS

This is an action for the refund of income taxes overpaid by plaintiff for the calendar year 1936 by reason of the failure to allow a deduction for a loss sustained on the sale of shares of stock of

the Chase National Bank. The defendant had judgment which was entered on December 18, 1943. Plaintiff, having this day taken an appeal from said judgment and having filed with the Clerk of the above entitled Court a Designation of Contents of Record on Appeal, herewith states the points upon which it intends to rely upon said appeal:

1. The plaintiff having made purchases of Chase National Bank stock and Chase Securities Company stock as units and said units having thereafter been dissolved and the plaintiff having [54] received upon such dissolution separate certificates representing the Bank stock and the Securities stock, contends that it is entitled to apportion the unit cost between the constituent stocks for the purpose of determining a deductible loss on the sale of the Bank stock prior to a sale of the Securities stock.

2. Plaintiff contends that such apportionment must be made either (a) on the basis of the respective values of the constituent stocks at the time of purchase or (b) upon the basis of the respective values of the constituent stocks at the time of the dissolution of the units.

3. Plaintiff further contends that upon the stipulated facts and the uncontradicted evidence, it was entitled to a judgment for income taxes overpaid for the year 1936 by reason of the failure to allow as a deduction the loss on the sale of said Chase National Bank stock.

Dated: March 7, 1944.

WALTER SLACK,

Attorney for Appellant.

Receipt of a copy of the within Statement of Points this 7th day of March, 1944, is hereby admitted.

FRANK J. HENNESSY,

U. S. Attorney Per T. S.

Attorney for Appellee.

[Endorsed]: Filed Mar. 7, 1944. [55]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

The plaintiff above named, having this day given Notice of Appeal from the final judgment entered in the above entitled action on December 18, 1943, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint to recover income taxes illegally collected (omitting Exhibit "A" attached to the complaint which is duplicated as Exhibit "E" attached to the Stipulation of Facts).

2. Answer.

3. Findings of Fact and Conclusions of Law.

4. Judgment.

5. Stipulation of Facts with all Exhibits referred to therein. [56]

6. Testimony of Thomas C. Montgomery contained in his deposition.

7. Notice of Appeal.

8. This Designation of Contents of Record on Appeal.

9. Statement of Points.

Dated: March 7, 1944.

WALTER SLACK,

Attorney for Appellant.

Receipt of a copy of the within Designation of Contents of Record on Appeal this 7th day of March, 1944, is hereby admitted.

FRANK J. HENNESSY,

U. S. Attorney Per T. S.

Attorney for Appellee.

[Endorsed]: Filed Mar. 7, 1944. [57]

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO TRANSMIT
ORIGINAL EXHIBITS FOR USE ON APPEAL

Pursuant to the attached Stipulation and good cause therefor appearing, the Clerk of this Court is authorized and directed to transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, as a part of the record upon Plain- [58] tiff's appeal from judgment heretofore entered in the above entitled action, Exhibits A, B, C, D, E and F, referred to and described in the Stipulation of Facts upon file in the above en-

titled action, which said exhibits were heretofore admitted in evidence upon the trial of said action.

Dated: April 3, 1944.

LOUIS E. GOODMAN,

United States District Judge.

[59]

[Title of District Court and Cause.]

STIPULATION FOR ORDER AUTHORIZING
TRANSMISSION OF ORIGINAL EX-
HIBITS FOR USE ON APPEAL

It Is Hereby Stipulated by and between the undersigned, counsel for the above named parties, that the above entitled Court may make an order authorizing the Clerk of said Court to transmit [60] to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, for use upon Plaintiff's appeal in the above entitled action, original Exhibits A, B, C, D, E and F, referred to in the Stipulation of Facts on file in the above entitled action and heretofore admitted as exhibits upon the trial of said action.

Dated: March 30, 1944.

WALTER SLACK,

Attorney for Plaintiff.

FRANK J. HENNESSY,

United States Attorney.

By ESTHER B. PHILLIPS,

Assistant U. S. Attorney,

Attorney for Defendant.

[Endorsed]: Filed Apr. 3, 1944. [61]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 61 pages, numbered from 1 to 61, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Spreckels-Rosenkrans Investment Company, a Corp., Plaintiff, vs. John V. Lewis, former Collector of Internal Revenue of the United States for the First District of California, Defendant. No. 22309-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Eight dollars and no cents (\$8.00) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of April A. D. 1944.

[Seal]

C. W. CALBREATH,
Clerk.

WM. J. CROSBY,
Deputy Clerk. [62]

[Endorsed]: No. 10739. United States Circuit Court of Appeals for the Ninth Circuit. Spreckels-Rosekrans Investment Company, a Corporation, Appellant, vs. John V. Lewis, former Collector of Internal Revenue, of the United States for the First District of California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 13, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10739

SPRECKELS - ROSEKRANS INVESTMENT
COMPANY,

Appellant,

vs.

JOHN V. LEWIS, former Collector of Internal
Revenue of the United States for the First
District of California,

Respondent.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY UNDER
RULE 19 AND DESIGNATION OF THE
PARTS OF THE RECORD TO BE
PRINTED

Appellant hereby refers to and formally adopts the Statement of Points filed with the Clerk of the United States District Court for the Northern District of California, Southern Division, in the above-entitled case therein pending.

Appellant designates as the parts of the record which it thinks necessary for the consideration of the above appeal the entire typewritten transcript of record certified by the Clerk of the Southern District and on file in the above-entitled appeal, together with original Exhibits C and E transmitted by said Clerk pursuant to the order of the above-mentioned District Court.

Dated: April 14, 1944.

WALTER SLACK,
Attorney for Appellant.

Receipt of a copy of the foregoing Statement of Points Upon Which Appellant Intends to Rely Under Rule 19 and Designation of the Parts of the Record to be Printed this 14th day of April, 1944, is hereby admitted.

FRANK J. HENNESSY,
Per T. S.
U. S. Attorney, Attorney for
Appellee.

[Endorsed]: Filed April 14, 1944. Paul P.
O'Brien, Clerk.

No. 10,739

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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

SPRECKELS-ROSEKRANS INVESTMENT COMPANY,
Appellant,

VS.

JOHN V. LEWIS, former Collector of Internal
Revenue of the United States for the First
District of California,
Respondent.

APPELLANT'S OPENING BRIEF.

WALTER SLACK,
433 California Street, San Francisco, California,
Attorney for Appellant.

T. M. WILKINS,
Union Trust Building, Washington, D. C.
Of Counsel.

FILED

JUN 21 1944

PAUL P. O'BRIEN,
CLERK

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No. 10,739

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

SPRECKELS-ROSEKRANS INVESTMENT COMPANY,
Appellant,

VS.

JOHN V. LEWIS, former Collector of Internal
Revenue of the United States for the First
District of California,
Respondent.

APPELLANT'S OPENING BRIEF.

JUDGMENT BELOW.

Appellant brought this action to recover an overpayment of income tax for the year 1936 resulting from the denial of a deduction for a loss sustained on the sale in that year of 300 shares of the capital stock of the Chase National Bank. Judgment denying the recovery and for respondent's costs was entered pursuant to findings of fact and conclusions of law on December 18, 1943. The Court below filed no opinion in the case.

**STATEMENT OF PLEADINGS AND FACTS
SHOWING JURISDICTION.**

The appellant is a Nevada corporation authorized to do business in the State of California, with an office in the City and County of San Francisco. (R. 10.) On March 15, 1937, the appellant filed its income tax return for the year 1936 with the respondent, John V. Lewis, the then Collector of Internal Revenue for the First District of California, and paid the income tax shown due thereon to the respondent in installments on March 15, June 15, September 9 and December 23, 1937. (R. 11.) The respondent ceased to be Collector of Internal Revenue on March 6, 1938. (R. 11.) On March 13, 1940, the appellant filed with the Collector of Internal Revenue at San Francisco, California, a claim for the refund of \$5370.56 being the amount of income taxes collected for the year 1936 by reason of the disallowance of the loss on the sale of the Chase Bank stock. (R. 21.) This claim was rejected on October 2, 1940, and notice of rejection and disallowance of the claim was mailed to appellant by registered mail on October 2, 1940. (R. 33.) The present complaint was filed on September 17, 1942. (R. 7.)

The District Court had jurisdiction of the action under Section 24 of the Judicial Code (U.S.C.A., Title 28, Section 41), the proceeding being a suit of a civil nature where the matter in controversy exceeds the sum of \$3000.00, and arising under the laws of the United States, and also being a suit arising under a law providing for internal revenue. This

Court has jurisdiction of the appeal under Section 128, Judicial Code (U.S.C.A., Title 28, Section 225).

ABSTRACT OF CASE.

Appellant in its refund claim and in its complaint in the District Court claimed that it had overpaid its income tax for the year 1936 by reason of the following facts:

In the year 1930 appellant had purchased 300 units, each unit consisting of one share of the capital stock of the Chase National Bank of the City of New York (hereafter called "Chase Bank") and one share of the capital stock of the Chase Securities Corporation (hereafter called Chase Securities) at a total cost of \$50,696.25. (R. 17.)

At the time of the purchase of these units, the stock of the Chase Bank and Chase Securities were not separately transferable. The Chase Bank and Chase Securities, however, were two separate corporations, the one a national banking association and the other a corporation organized under the laws of the State of New York and the unit holder was a voting stockholder in each corporation. The inseparability of the stock in connection with its transfer was achieved under the terms of an agreement dated March 21, 1937, by the device of printing the certificates of the respective stocks on the opposite faces of a single sheet of paper and an endorsement of the restriction on each face. (R. 12-14; Exhibit C, R. 19.)

Pursuant to the provisions of the Federal Banking Act of 1933 requiring the separation of national banks and their affiliates, the agreement of March 21, 1917, was terminated on June 14, 1934, and the certificate of incorporation on Chase Securities was amended to eliminate all provisions preventing the separate sale of its stock. (Stipulation of Facts, Paragraph X, R. 16.) The certificates representing the units were surrendered and, in exchange separate certificates were issued for an equal number of shares of the Chase Bank stock and, the Chase Securities having reduced its capitalization and changed its name, for Amerex Holding Corporation stock at the rate of one share of Amerex stock for each ten shares of Chase Securities stock. As a result, appellant on June 14, 1934, received certificates for 300 shares of Chase Bank stock and 30 shares of Amerex Holding Corporation stock. (Complaint, Paragraph VI admitted by the Answer, R. 5, and Stipulation of Facts, Paragraphs VI, VII, VIII and X, R. 12-15.)

On December 22, 1936, appellant sold the 300 shares of Chase Bank stock for \$13,482.15. (Stipulation of Facts, Paragraph XI, R. 18.) In filing its income tax return for 1936 appellant did not take any deduction for the loss sustained on the sale of the Bank stock. (Stipulation of Facts, Paragraph V, R. 12.)

On March 13, 1940, within three years after the filing of its income tax return for the year 1936, appellant filed a claim for the refund of its 1936 income taxes in the amount of \$5370.56, basing the claim on appellant's failure to deduct a loss of \$22,005.23

on the sale of the 300 shares of Chase Bank stock. (Stipulation of Facts, Paragraph XII, R. 21.) A certified copy of the claim was received in evidence as Exhibit E. (R. 21-33.) In the refund claim appellant asserted that it was appropriate and feasible to make an allocation of the cost of the units between the Chase Securities stock and submitted data substantiating an allocation of the cost, 70% to the Bank stock and 30% to the Securities stock. On the basis of this allocation, appellant had overpaid its income tax for the year 1936 in the amount of \$5370.56, as claimed.

As heretofore stated, on October 2, 1940, the claim for refund was rejected and notice thereof given as required by law. The suit in the District Court followed.

The answer of the respondent in the Court below raised no issue except as to the right of plaintiff to allocate the cost of the units between the component stocks and of the amount of the loss sustained. The case was submitted to the District Court on a stipulation of facts, expanding considerably the history of the Chase Bank and Chase Securities Corporation as set out in the complaint, and furnishing market quotations of the respective stocks immediately after the removal of the restriction on separate transfers and upon the deposition of Thomas C. Montgomery as to a fair allocation of the cost between the respective stocks as of the dates of the acquisition of the units.

The District Court found that the appellant's original investment was a single investment and that it was neither reasonable nor practicable to allocate to the two stocks a portion of the amount of appellant's original investment. Without finding as to the value of the component stocks as of the date of acquisition or as of the exchange of the units for separate certificates of stock, the Court ordered judgment for the respondent. (R. 70-71.)

SPECIFICATIONS OF ERRORS.

Appellant specifies the following errors on this appeal.

(1) The failure of the District Court to apportion the unit cost of the purchase of Chase Bank and Chase Securities stock between the constituent stocks for the purpose of determining a deductible loss on the sale of the Bank stock prior to a sale of the Securities stock.

(2) The failure of the District Court to apportion such cost either (a) on the basis of the respective values of the constituent stocks at the time of purchase or (b) upon the basis of the respective values of the constituent stocks at the times of the dissolution of the units.

(3) The determination of the District Court that it was neither reasonable nor practicable to allocate to the constituent stocks a portion of the amount of the original investment of the appellant.

(4) The finding of the District Court, there being no evidence to support the same, that appellant's original investment in the Chase Bank and Chase Securities stock was a single investment.

(5) The finding of the District Court, there being no evidence to support the same, that appellant did not allocate any portion of the original cost to the constituent stocks.

(6) The failure of the District Court upon the stipulated facts and the uncontradicted evidence, to order judgment for appellant for income taxes overpaid for the year 1936 by reason of the disallowance of the loss on the sale of said Chase Bank stock.

SUMMARY OF ARGUMENT.

Appellant urges that under the law and regulations and upon the agreed statement of facts and uncontradicted evidence it was entitled to apportion the cost of the units of Chase Bank and Chase Securities stock between the two stocks for the purpose of determining gain or loss on a sale of either stock subsequent to the dissolution of the units, i.e., that it is appropriate and feasible to make an allocation of the cost of the units between the component stocks, and that such apportionment being required, it should be made either upon the basis of the respective values of the components at the date of acquisition or of those respective values at the date of the dissolution of the units.

ARGUMENT.**1. SCOPE OF REVIEW—WEIGHT TO BE GIVEN FINDINGS.**

The crux of the case is disposed of by the trial Court in its finding III, reading:

“The Court finds that it is neither reasonable nor practicable to allocate to each stock a portion of the amount of the original investment of the plaintiff”.

Whether this is to be regarded as a conclusion from finding II, that appellant’s original investment was “single” and that appellant did not at the date of purchase “allocate any portion of the original cost” to the several shares making up the units, findings without evidentiary support, or whether finding III is an independent finding of fact, it is not entitled any great weight in the determination of this appeal for the reason that the evidence was entirely documentary and by deposition, the testimony in which was uncontradicted.

This Court, in *Equitable Life Assurance Society v. Irelan*, 123 F. (2d) 462, 464, speaking through Circuit Judge Healy, in reversing a judgment against an insurance company based on a finding that the decedent’s death was accidental, says:

“Since all testimony bearing on the circumstances antecedent to and surrounding her death was by deposition, the finding of accidental death, while it is justly entitled to consideration, has not the weight we would otherwise be obliged to concede to it. This court is in as good a position as the trial court was to appraise the evidence and

we have the burden of doing that. Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, was intended to accord with the decisions on the scope of the review in federal equity practice; and, as is well known, in the federal courts where the testimony in equity or admiralty cases is by deposition the reviewing court gives slight weight to the findings.”

See also:

Smith v. Royal Insurance Company, 125 F.

(2d) 222, 224,

where this Court likewise reversed a judgment of the District Court, saying:

“The bulk of the evidence bearing on the subject is of a documentary nature or rests on circumstances concerning which there is no dispute. Accordingly the finding of falsity does not command the strong presumption of verity which usually attends a finding.”

Norment v. Stillwell (C.C.A. 2nd Cir.), 135 F.

(2d) 132;

O'Brien, *Manual of Federal Appellate Procedure* (1941) Supp. No. 2, p. 9.

2. FINDINGS UNSUPPORTED.

(a) Finding II.

As already noted and specified as error, there is no support whatsoever in the record for the trial Court's finding II, reading:

“The Court finds that plaintiff's original investment made in 1930 in the Chase National

Bank and its affiliate, Chase Securities Corporation, was a single investment; and that in making said original investment on March 3, 1930, plaintiff did not then allocate any portion of the original cost to the shares of stock of the Chase National Bank and a portion to the shares of stock of Chase Securities Corporation. (R. 70.)

There is no allegation or issue in the pleadings upon which the finding can be predicated and furthermore its conclusions appear to be immaterial in any event. There is of course no question but that appellant's three investments made in 1930 were in one hundred unit lots of Chase Bank and Chase Securities stock, and, as has been pointed out, if the units are to be regarded as "single investments", the respondent but finds himself on the other horn of a dilemma, since it clearly appears that the "single investment" ceased to exist on June 14, 1934, more than two years before the sale of the 300 shares of Chase Bank stock received on that day, and that the sale was of a security received in an exchange and the cost should be apportioned as of the date of the exchange.

The second portion of the finding is entirely without support and if of any significance must be ignored as being outside the record in either Court.

(b) Finding III.

This finding reads:

"The Court finds that it is neither reasonable nor practicable to allocate to each stock a portion of the amount of the original investment of the plaintiff." (R. 70.)

Since this finding is made, notwithstanding Montgomery's uncontradicted testimony that the cost of the units can be allocated as of the date of purchase, 75% to the Chase Bank stock and 25% to the Chase Securities stock, and of the stipulated market quotations of the day after the dissolution of the units, establishing an allocation ratio of 95% for the Chase Bank stock and 5% for the Chase Securities stock, it must be that the finding is to be regarded as a conclusion of law, that the trial Court considered that either the law or the regulations precluded such allocation either because of the "single investment" character of the original purchase, or because the appellant had not at the time of purchase allocated its cost between the several stocks, a matter neither proved nor in issue.

Since the finding thus in effect becomes a conclusion of law and since its validity is essential to the determination of this appeal, the factual and legal questions are fully open to consideration by the Appellate Court.

The argument in this brief will therefore proceed upon the theory that the Appellate Court should and will examine the record and itself determine the proper conclusions to be drawn from the stipulated facts and the uncontradicted testimony of the single witness whose deposition was taken and introduced by appellant.

3. THE REVENUE ACTS, REGULATIONS AND COURT AND BOARD DECISIONS RECOGNIZE AND REQUIRE THAT COST OF UNITS COMPOSED OF SEVERAL ITEMS BE APPORTIONED.

While the specific application of the rule as to apportionment of cost between several items acquired at a gross or lump sum figure to purchases and sales of units of stock of two or more corporations has been involved in but few decisions, the general problem arises in many transactions involving the determination of tax liability, and no particular difficulty has been experienced in making such apportionment.

(a) Apportionment of cost between depreciable and non-depreciable assets acquired for lump sum.

Perhaps the situation most frequently arising is the apportionment among the components of the cost of land, buildings and equipment purchased for a lump sum price. Apportionment is required in every such instance to establish the basis for depreciation on the depreciable items and ultimately the gain or loss on a resale of the property.

Reg. 111, Sec. 29.23 (1) 4. "*Capital sum recoverable through depreciation allowances.*—The capital sum to be replaced by depreciation allowances is the cost or other basis of the property in respect of which the allowance is made. * * * In the case of the acquisition on or after March 1, 1913, of a combination of depreciable and non-depreciable property for a lump price, as, for example, buildings and land, the capital sum to be replaced is limited to an amount which bears the same proportion to the lump price as the *value*

of the depreciable property at the time of acquisition bears to the *value* of the entire property at that time. * * *

(b) **Apportionment of basis where two kinds of property are received on a tax-free exchange.**

It frequently occurs on a tax-free exchange arising from a reorganization or otherwise, that a taxpayer will receive two kinds of property upon the surrender of his original property and, since the law requires the continued use of the basis of the original property in determining gain or loss on the sale of the property received in exchange, there must be an apportionment of that basis. Such a necessity arises, for example, when common stock is exchanged for new preferred and common, or for stock in two new corporations. The courts and Board of Tax Appeals have repeatedly made an apportionment in such cases.

Appeal of Glenn H. Curtiss, 21 B. T. A. 629, 636, quoting from and applying article 1567 of Regulations 62, reading in part as follows:

“* * * When securities of a single class are exchanged for new securities of different classes so that no gain or loss is realized under the provisions of paragraph (b) of article 1566 (relating to reorganizations), for the purpose of determining gain or loss on the subsequent sale of any of the new securities the proportion of the original cost, or other basis, to be allocated to each class of new securities is that proportion which the market value of the particular class bears to the market value of all securities received on the date of the exchange.”

This decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit in *Curtiss v. Commissioner*, 57 F. (2d) 847, 848-9. See also: *Houghton v. Commissioner*, 71 F. (2d) 656, 657-8; *Salvage v. Commissioner*, 76 F. (2d) 112, affirmed *Helvering v. Salvage*, 297 U. S. 106, 80 L. ed. 511.

An analogous situation arises on a partially tax-free exchange where the taxpayer receives non-taxable property together with property of a type not permitted to be received tax-free. Here the statute itself requires an apportionment.

Internal Revenue Code, Sec. 113 (a) (6), providing that property acquired upon a tax-free exchange shall take the same basis for determining gain or loss as the property exchanged, reads:

“* * * If the property so acquired consisted in part of the type of property permitted by section 112 (b) or section 112 (l) to be received without the recognition of gain or loss, and in part of other property, the basis provided in this paragraph shall be *allocated* between the properties (other than money) received, and for the purpose of the allocation there shall be assigned to such other property an amount equivalent to its fair market value at the date of the exchange.”

Likewise, where under Revenue Acts prior to 1934, no gain or loss was recognized if a stockholder in a corporation, a party to a reorganization, without surrender of his stock, received stock in other corporations pursuant to the plan of reorganization, such stockholder is required by Reg. 111, Sec. 29.113(a)

(12)-1 (2), to “apportion” the cost or other basis of his original stockholding “between such stock and the stock or securities distributed in proportion, as nearly as may be, to the *respective values* of each class of stock or security, old and new, *at the time of such distribution*, and the basis of each share of stock or unit of security will be the quotient of the cost or other basis of the class of stock or security to which such share or unit belongs, divided by the number of shares or units of each class.”

(c) Apportionment where stock is received as a bonus with the purchase of other stock.

Reg. 111, Sec. 29.22 (a)-8 provides:

“* * * If common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost.”

* * * * *

“(1) If the shareholder does not exercise, but sells, his rights to subscribe, the cost or other basis, properly adjusted, of the stock in respect of which the rights are acquired shall be apportioned between the rights and the stock in proportion to the *respective values* thereof at the time the rights are issued, * * *.”

- (d) **Apportionment of cost where land is purchased for subdividing.**

Reg. 111, Sec. 29.22 (a)-11 provides:

*“Sale of real property in lots.—If a tract of land is purchased with a view to dividing it into lots or parcels of ground to be sold as such, the cost or other basis shall be equitably apportioned to the several lots or parcels and made a matter of record on the books of the taxpayer, to the end that any gain derived from the sale of any such lots or parcels which constitutes taxable income may be returned as income for the year in which the sale is made. * * *”*

- (e) **Apportionment of discovery value between land and natural resources for computation of depletion and of accounting.**

Reg. 111, Sec. 29.23 (m)-3, providing for the computation of depletion of mines on the basis of discovery value, requires that

“The value must be equitably apportioned between the owners of the economic interest therein.”

Reg. 111, Sec. 29.23 (m)-27, providing for aggregating timber and land for purposes of valuation and accounting, reads:

“The timber accounts mentioned in the preceding paragraph shall not include any part of the value or cost, as the case may be, of the land. In a manner similar to that prescribed in the foregoing part of this section the land in a given ‘block’ may be carried in a single land account or may be divided into two or more accounts on the basis of its character or accessibility. When such a division is made, a proper portion of the total value or

cost, as the case may be, shall be allocated to each account.

“The total value or total cost, as the case may be, of land and timber shall be equitably allocated to the timber and land accounts, respectively.”

- (f) Allocation of cost of production of different products produced by a single process.**

Reg. 111, Sec. 29.22 (c)-7:

“Inventories of miners and manufacturers.—A taxpayer engaged in mining or manufacturing who by a single process or uniform series of processes derives a product of two or more kinds, sizes, or grades, the unit cost of which is substantially alike, and who in conformity to a recognized trade practice allocates an amount of cost to each kind, size, or grade of product, which in the aggregate will absorb the total cost of production, may, with the consent of the Commissioner, use such allocated cost as a basis for pricing inventories, provided such allocation bears a reasonable relation to the respective selling values of the different kind, sizes, or grades of product.”

- (g) Allocation of cost or other basis proper where stock in two corporations purchased as a unit.**

The uniformity of apportionment of cost or other basis between different properties acquired as a unit, disclosed in the foregoing instances, indicates that such procedure is likewise proper in the present case where stocks of two corporations are purchased as a unit and under conditions which prevent their separate acquisition or sale, if such apportionment subsequently becomes necessary for the proper determination of

income tax. While at first impression it may appear that the decisions involving this latter situation are not uniform, it is believed that upon examination they will be found to uphold the right of allocation and, that, in any instance where allocation was refused, such refusal was based upon the insufficiency of the evidence of value and not upon the absence of such right.

The Board of Tax Appeals uniformly recognized the right to apportion the cost in cases involving the sale of units of bank and affiliated corporation stocks. The leading decision of the Board, is the *Appeal of Stanley Hagerman*, 34 B. T. A. 1158. Hagerman claimed a loss on the sale in 1933 of "declarations of interest" in the dividends and other distributions of First Security Company, a former affiliate of the First National Bank of the City of New York. These interests had been acquired in 1918, 1919 and 1931 in connection with the purchase of shares of the stock of the bank, each share being endorsed with a certificate of interest in the First Security Company and the interests being alienable only in connection with the sale of the accompanying bank stock. As in the case of the Chase National Bank and as required by the Federal Banking Act of 1933, the First National Bank in December, 1933, divorced its affiliate and on December 9, 1933, Hagerman received bank shares without endorsement and separate "declarations of interest" in the Security Company in exchange for the endorsed bank shares held by him. The Commissioner disallowed the claimed loss on the ground that it was

impracticable to allocate or apportion fairly to the declarations of interest a portion of the unit cost of the certificates representing the bank stock and the declarations of interest in the Security Company.

The Board, however, held, after a review of the authorities, that such apportionment was proper and could be made upon the testimony of expert witnesses as to such values. The Board after stating the issues says (pp. 1164-1166):

“The statute applicable to the issues involved herein is found in the Revenue Act of 1932, sections 111 (a) and 113 (a). That act and prior acts provide for an apportionment of cost under certain circumstances, the method of apportionment of cost of property received in connection with tax-free distributions being left to rules and regulations prescribed by the Commissioner. See *Philip D. C. Ball*, 27 B. T. A. 388, 394; *affd.*, *Von Weise v. Commissioner*, 69 Fed. (2d) 439, and authorities therein cited. Article 58 of Regulation 77, which is quoted by both petitioner and respondent herein, provides in part as follows:

“* * * Where common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost.

“Inasmuch as both parties have quoted said article, they seem to be in accord that this is a case arising thereunder. No regulation seems to provide definitely for an apportionment of cost under the exact circumstances arising in this case, but it comes within the general principle embodied in the above statute and regulations.”

* * * * *

“By the testimony of witnesses and other evidence in the record, it was, in our opinion, shown that the fair market price of the aforesaid units at all times exceeded the market value of the Bank stock if considered separately and so offered for sale. Each of the two stocks, or interests, at all times had a value. The aforesaid agreement between stockholders that neither stock should or could be sold separately did not have the effect of depriving either stock of its value nor, in our opinion, did the agreement make the determination of their separate values impossible or impracticable. Cf. *Collin v. Commissioner*, 32 Fed. (2d) 753; *Newman v. Commissioner*, 40 Fed. (2d) 225, 227; certiorari denied, 282 U. S. 858; *Tex-Penn Oil Co. v. Commissioner*, 83 Fed. (2d) 518.

“There were no actual sales of either Bank stock or Security Co. stock separate from the other at any time prior to December 1933, so that it is impossible to determine the values of either stock on the basis of sales. *The absence of sales, however, in our opinion, does not necessarily make impossible or impracticable the determination of the fair market value of the separate stocks or interests or their value for the purpose of apportionment.*

“We have heretofore held: ‘The absence of active trading in a stock does not necessarily show lack of fair market value, and under the circumstances other evidence, including evidence as to the intrinsic value of the assets back of the stock, should be considered in determining whether the stock had a fair market value.’ *George M. Wright*, 19 B. T. A. 541, 548; *affd.*, 50 Fed. (2d) 727; *certiorari denied*, 284 U. S. 652. See also *George W. Griffiths*, 25 B. T. A. 1292; *affd.* 70 Fed. (2d) 946; *Helvering v. Kendrick Coal & Dock Co.*, 72 Fed. (2d) 330; *certiorari denied*, 294 U. S. 716.” (Emphasis supplied.)

The Board discusses the *Appeal of Tex-Penn Oil Co.*, 28 B. T. A. 917, 961-966; *Appeal of T. W. Heritze*, 28 B. T. A. 1173, and *Collin v. Commissioner*, 32 F. (2d) 753, all to the effect that a voluntary agreement restricting the sale of stock of a corporation does not prevent the stock from having a fair market value.

The Board then considered the *Appeal of Erskine Hewitt*, 30 B. T. A. 962, and the *Appeal of Edwin D. Axton*, 32 B. T. A. 613, cited by the Commissioner as authority for refusing apportionment and says (p. 1168):

“In the instant case the situation is quite different, as our findings of fact show, and ‘It is well settled that where property is acquired en bloc or en masse and subsequently sold in lots or parcels, a computation of gain or loss must be made upon each separate sale and the result reported in the tax return and not held in abeyance or suspense until the entire cost of the prop-

erty is recovered.' *Bancitaly Corporation*, 34 B. T. A. 494, 504. The principle above enunciated, in our opinion, is applicable in the instant case, since *it is not impracticable in the circumstances to apportion fairly the cost of the component elements making up a unit of said Bank stock and the endorsement thereon of beneficial interest in the Security Co.*" (Emphasis supplied.)

* * * * *

"Impracticability has been defined as incapable of being effected from lack of adequate means, impossible of performance, not feasible. *Des Portes v. Southern Railway Co.*, 69 S. E. 148; *People v. Poly*, 40 N. Y. S. 990, 992. Also it has been said that 'impracticability' and 'impossibility' are of equal legal effect. *Cosden Oil & Gas Co. v. Moss*, 267 Pac. 855. We cannot believe that it was 'impracticable' to arrive at separate valuations upon the Bank stock and the certificate of participation in the Security Co. in this case. Obviously, it was not impossible, not even particularly difficult. The evidence used was competent under the *Arton* case, *supra*, and the difference of opinion between the witnesses was no more than indicative of good faith testimony."

The Board also referred to the *Appeal of Glenn H. Curtiss*, 21 B. T. A. 629, affirmed 57 F. (2d) 847, *supra*, and *Salvage v. Commissioner*, 76 F. (2d) 112, *supra*, as other instances where apportionment had been made of the cost of stock included in a unit purchase or acquisition.

The decision of the Board concluded (p. 1170): "that it was possible and practicable to apportion

fair market value to the certificates or declarations of interest at the time of purchase thereof". This decision was affirmed by the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Hagerman*, 102 F. (2d) 281.

In the *Appeal of Barber Securities Corporation*, 45 B. T. A. 521, one of the issues involved the apportionment of unit cost of Chase National Bank and Amerex Holding Corporation stocks, the taxpayer claiming a loss on the sale of the latter stock. The Board adhered to its decision in the *Hagerman* case, saying, page 527: "There is thus ample authority for an apportionment if the same be practicable". The evidence of value before the Board consisted entirely of a stipulation as to the net asset values of the capital stocks of the respective corporations as shown by their books at the date of acquisition. While this evidence alone might have been sufficient, the stipulation went further and stated "that the book figures do not reflect appreciation or depreciation in market value above or below cost of the underlying assets". The Board says (p. 527):

"Hence, the book figures cannot be accepted as showing the true value of the shares of the separate corporations. There is no opinion evidence of values nor any record of separate earnings of the securities companies. Accordingly, there is no factual basis upon which we can apportion petitioner's cost."

In the *Appeal of Orvilletta, Inc.*, 47 B. T. A. 10, the Board was again asked to apportion cost between

shares of the Chase Bank and Chase Securities Corporation which had been acquired by the taxpayer in exchange for shares of the Equitable Trust Company and its affiliate, the Equitable Corporation. The taxpayer sought first to allocate the cost of the units of Equitable Trust Company and its affiliate and then to carry forward such allocation as the cost, respectively, of the Chase Bank and Chase Securities stocks. The Board, without questioning the right of allocation, held that the petitioner had not shown a sound basis for the allocation.

In the *Appeal of Andre deCoppet*, 38 B. T. A. 1381, the taxpayer claimed a loss on the liquidation of the Continental Corporation of New York, an affiliate of the Continental Bank and Trust Company of New York, *which was dissolved without assets and without distribution of its shares*, the Board refused to make an allocation of cost between shares of the Continental Bank and the beneficial interests in the Continental Corporation because of the involved transactions surrounding the acquisition of the interests. However, it again affirmed the correctness of its decision in the *Hagerman* appeal. The Circuit Court of Appeals for the Second Circuit in affirming the Board's decision, *deCoppet v. Commissioner*, 108 F. (2d) 787, advances the theory that the original investment was single and no loss could be claimed on the dissolution of the affiliate. The Circuit Court of Appeals for the Third Circuit, in *Wise v. Commissioner*, 109 F. (2d) 614, involving the same decision of the Board, the appeal of *Wise* having been con-

solidated with the appeal of deCoppet for trial before the Board, likewise affirmed but *found no conflict with the Hagerman decision*.

In *Pierce v. United States*, 49 Fed. Supp. 324, the Court of Claims had before it the precise situation that confronted the Board in the *Hagerman* case so far as the right of apportionment is concerned, as it was considering the right to deduct a loss from the sale in 1934 of certificates of interest in First Security Company. However, a comparison of the decisions shows that the evidence on the subject of the values of the respective items of stock making up the unit was not the same before the Board as before the Court. While the Court first bases its decision on the ground that upon the evidence before it apportionment was not practicable, it follows that statement with an analysis of the evidence of value characterizing it as but a "rough estimate when by patience an exact answer may be obtained". In view of that statement, the Court's criticism of the *Hagerman* case is clearly unwarranted.

It is submitted that in the cases cited, where the Board or a Court has refused to make an apportionment of the unit cost of banking corporation and affiliate stocks, such refusal was based not upon any question of the right to such an apportionment, but was in every instance the result of the failure to introduce evidence furnishing a factual basis for such an apportionment. It follows that the first proposition involved in this case is definitely answered and *that the cost of the acquisition of Chase units can be ap-*

portioned between the components. Therefore but one question remains for consideration, viz.: Did the appellant establish a factual basis for apportionment? This question will now be discussed.

4. BASIS FOR APPORTIONMENT.

(a) Consideration of evidence introduced in other cases involving unit purchases of Bank and affiliate stocks.

In the foregoing discussion it appears that in several cases apportionment was refused for lack of a factual basis in the evidence from which the unit cost could be allocated. An examination of the evidence introduced in these cases is a necessary preliminary to a consideration of the evidence before the Court in the present case. In that connection it is interesting to note that in cases involving *losses* from sales of components of unit holdings of stock, the Commissioner uniformly argues that apportionment is "impracticable", while in cases involving *profits* from such sales no such impracticability seems to exist. In fact in the case of *Houghton v. Commissioner*, 71 F. (2d) 656, cited *supra*, the Circuit Court of Appeals for the Second Circuit, where the taxpayer was resisting an assessment of income tax on an alleged profit from the sale of preferred stock received with common stock on an exchange, held that the *burden was on the taxpayer* to show that "an accurate appraisal, a genuine forecast of market value, was impossible". (p. 658.) The Commissioner, in the *Houghton* case, determined "market value" through a for-

mula using the average income of the company for five years and an appraisal of the tangibles. He then deducted from the average income, eight percent of the tangibles and capitalized the remainder at fifteen percent to obtain the value of the intangibles. The value of the common stock was the sum of the tangibles and intangibles less the part of the preferred stock. The Court, after conceding that in some instances a fair market value does not exist, pointed out that the shares sold by Houghton represented an "old, profitable, thoroughly seasoned business which had paid large dividends and was as stable as such ventures could well be", said, page 658:

*"Although these had not indeed been dealt in, so far as appears, there may have been persons, familiar with such securities, when listed upon an exchange, or traded in as unlisted stocks, who would have undertaken to appraise them, and whose estimates would have been a reliable judgment as to their 'market value'. That is not an uncommon way for example to appraise real property. Although each parcel is unique, a good appraiser will often predict its market price with surprising accuracy. Moreover, the conditions of a market might by proper publicity here have been created; a number of competing buyers, not confined to this investment. We cannot regard the evidence of the taxpayers as foreclosing that possibility; and it was on them to show that an accurate appraisal, a genuine forecast of market value, was impossible. This they might have done directly by calling witnesses, or as in *Collin v. Com'r*, *supra*, 32 F. (2d) 753 (C. C. A.), and*

Taylor v. Com'r, supra, 70 F. (2d) 619, by showing the inherent vice of the Commissioner's method. They have done neither and we can only assume that they could not do so." (Emphasis supplied.)

In other words, "market value," can be determined by formula, *or by opinion evidence* and the apparent absence of a market is no barrier to such determination. In that connection it should be noted that "fair market value" or even "market value" is not essential to apportionment. In the apportionment of cost between depreciable and non-depreciable assets, the allocation is on the respective "values" (3-(a), *supra*), and, while the expression "fair market value" is used in providing for the apportionment of basis on a tax-free exchange (3-(b), *supra*), the requirement in the case of stock received as a bonus is that the basis "be fairly apportioned," or in the case of stock rights, in proportion to the "respective values," (3-(c), *supra*). Likewise, in the apportionment of cost where land is subdivided and where depletion of discovery value is to be made, the costs are "equitably" apportioned or allocated (3-(d) and (e), *supra*).

In the *Hagerman* case the Board specifically comments on the fact that market value of the respective stocks can be determined, notwithstanding the impossibility of a separate transfer.

Wherein, then, did the taxpayers' proof fail in the cases where apportionment was refused?

In the *Appeal of Barber Securities Corporation*, 45 B. T. A. 521, *supra*, as has been noted, the only evi-

dence submitted was of the net book values of the capital stock of the respective corporations as of the date of acquisition of the units with the admission in the stipulation of facts that these values did not reflect appreciation or depreciation in market values. Commenting on this evidence the Board says (p. 527):

“The parties have stipulated the book values as of the date of acquisition by petitioner of the stock of the Chase Bank and Chase Securities and similarly as to the Commercial Bank and the Commercial Corporation. They further stipulate, however, that the book figures do not reflect appreciation or depreciation in market value above or below cost of the underlying assets. Proof of market value as of the date of the acquisition of the stocks is essential to our inquiry. We believe this lack of proof to be a fatal bar to petitioner’s contention. We do not know when the underlying assets were acquired, but, considering the history of the times before and after 1930, of which we take judicial notice, we can not assume that the book values represent true market values. Hence, the book figures can not be accepted as showing the true value of the shares of the separate corporations. *There is no opinion evidence of values nor any record of separate earnings of the securities companies.* Accordingly, there is no factual basis upon which we can apportion petitioner’s cost. *Edwin D. Axton*, 32 B. T. A. 613. Cf. *deCoppet v. Helvering*, 108 Fed. (2d) 787; also *Stanley Hagerman*, *supra*, where the Board was furnished with opinions of market value, the separate earnings of the Security Co., and other forms of evidence not presented here.” (Emphasis supplied.)

In the *Appeal of Orvilletta, Inc.*, 47 B. T. A. 10, *supra*, while the taxpayer avoided the objection fatal in the *Barber* case by setting forth the book values of the Equitable Corporation *with securities at market prices*, thus furnishing a basis for apportionment between the stock of that affiliate and the Equitable Trust Co., the proof failed for the reason that these separate values could not be applied to the shares of Chase Securities and Chase Bank stocks respectively received in exchange. The Board says:

“However, assuming that we accept petitioners’ alleged allocations, their position is still without merit. Upon the exchange of the Equitable Trust Co. and Equitable Corporation units petitioners received stock in the Chase Bank and Chase Securities Corporation. Petitioners claim that the Equitable Trust Co. stock was exchanged for the Chase Bank stock and Equitable Corporation stock was exchanged for Chase Securities Corporation stock. If this be true it is contrary to the stipulated facts, for in the wording of the stipulation:

* * * the aforesaid 100 units of stock consisting of said 100 shares of the capital stock of The Equitable Trust Company of New York and of said 100 shares of the capital stock of The Equitable Corporation of New York were exchanged by each of these petitioners for 80 units of stock consisting of 80 shares of the capital stock of the Chase National Bank of the City of New York and of 80 shares of the capital stock of Chase Securities Corporation.

Ignoring this part of the stipulation, we refer to the documents attached and incorporated

therein. From these we see that there was no real separation and that what was contemplated was an issuance of units of Chase Bank stock and Chase Securities Corporation stock at a ratio of 8 to 10 for the units of the Equitable Trust Co. and Equitable Corporation stock. Neither Chase Bank nor Chase Securities stock was transferable separately. The quotations on the market were for a unit of one share of Chase Bank stock and one share of Chase Securities stock. The legend which each certificate bore shows further that the stocks were inseparable. Therefore, even though it were possible to determine separate cost bases for petitioners' Equitable Trust Co. and Equitable Corporation stocks, they were exchanged for inseparable units. We are unable to determine from the record that the cost of the Chase Bank stock was the Equitable Trust Co. stock and the cost of the Chase Securities stock was the Equitable Corporation stock.

Moreover, if we were able to so determine, we would be faced with a still further dilemma. It was stipulated that in November 1931 the original cost bases were reduced by certain so-called wash sales. Even if the Chase Bank and Chase Securities stocks had had separate cost bases, we would be unable to determine which of those bases was so reduced, or, if both were reduced, what amount of the reduction is allocable to each. It is inconceivable that the reduction on both would be in exact proportion to the alleged cost basis of each.

We find it impossible to determine separate cost bases for the component parts of the inseparable units of Chase Bank and Chase Securities stock."

In *Pierce v. United States*, 49 Fed. Supp. 324, *supra*, the Court of Claims, considering the practicality of apportioning costs of units of the First National Bank of the City of New York and its affiliate, the First Security Corporation, to determine a loss on sales of declarations of interest in the affiliate, had before it balance sheets of the Bank and the affiliate valuing the assets at fair market value as of the dates of the purchase of units (p. 328) and the testimony of witnesses suggesting values on the basis of a ratio of price to book value as between stocks of Banks with affiliates and of Banks without affiliates (p. 330). These suggested values differed widely from those arrived at by valuing assets, and the Court refused to accept either, saying (p. 330):

“Either of these methods seems plausible to us, as a rough guess at a value that might be attributed. But we do not think that the situation calls for such a rough estimate, when by patience the exact answer may be obtained.”

It must be confessed that it is difficult to understand why the Court of Claims rejected the asset value formula because of the “rough guess” of the witnesses on another basis of valuation, unless it was for a reason not stated, viz.: the failure to provide earning statements of the two companies from which the value of intangibles could have been computed under the formula approved in the *Houghton* case, 71 F. (2d) 656, *supra*.

However, it is important to consider two differences between the situation with reference to the First Na-

tional Bank of New York and the Chase National Bank. In the first place, the Court in the *Pierce* case found (p. 328):

“The reports of the condition of the Bank at the close of business April 30, 1928, March 31, 1930, and November 30, 1932, contain no reference to the Security Company. The Security Company never made public any information concerning its assets, liabilities, earnings, or sources of income.”

This information was available as to the Chase Securities Corporation. (Deposition R. 44-45.) In the second place, the Court notes (p. 329) that the First National stockholders were but beneficiaries of a trust of which the First Security Corporation stock constituted the corpus, a trust over which they had only a limited control. On the other hand, the stockholders of Chase Bank were actual stockholders of Chase Securities Corporation.

In the *Appeal of Andre deCoppet*, 38 B. T. A. 1381, *supra*, the Board places its refusal to apportion costs mainly on the ground that the taxpayer never had an investment in the affiliate, whose stock was held by trustees, but only in the Bank. Apparently the only evidence of value for apportionment arose from Bank stockholders' purchase of bank stock at \$40 per share, \$10 of which the Bank was authorized to pay as subscription to two shares of the affiliate. In refusing to apply the rule of the *Hagerman* case, the Board said (p. 1394):

“But if it were proper to consider the petitioners' investment as divisible between the bank

shares and the beneficial interest in the investment shares, the question of the practicability of apportionment of basis would become important. We should find such an apportionment wholly impracticable. There is only a short parallel of the complex circumstances of acquisition here, as in deCoppet's case, and the comparatively simple circumstances of the transactions considered in *Stanley Hagerman, supra*. *These petitioners bought shares for cash, acquired them by inheritance, in discharge of loans, as dividends, and by the exercise of rights; both corporations canceled shares, the bank participated in a merger which involved a change in the investment corporation's share structure, and its assets and liabilities were shifted for the convenience of the bank.* The problem of computing the basis of shares in the investment corporation is thus far more difficult than in the cases cited.

Complexity and difficulty of computation are in themselves insufficient reasons for denying the deduction, and neither the Commissioner nor the Board may refuse to ascertain the amount of deduction merely because its computation is a burdensome task. The question whether an apportionment is practicable, however, goes further.

If this case had involved but the sale by each petitioner of a separate share in the investment corporation received from the trustees at a time when the shareholder's right thereto was the direct result of his paying the \$40 to the bank upon the understanding that \$10 would be turned in to the investment corporation, the gain or loss from such a sale might have been computed upon the basis of such \$10 for each two shares sold. That, however, is not the question to be decided.

The acts of June 1929 were still more complex and were soon enmeshed in such later transactions as obscured them entirely. Any calculation of a separate basis would require some appraisal of several imponderable factors. The \$2,000,000 gain in Thirty Broad Street shares is illustrative. The apportionment would be entirely artificial and quite unworthy of use—hardly reliable enough to be called ‘practicable.’ ” (Emphasis supplied.)

Having studied the factual background of the cases refusing allocation of unit costs, the situation in the *Hagerman* case, 34 B. T. A. 1158, where allocation was made, should be considered. The Board in its findings of facts on pages 1161-1164 of the report, details this evidence, all of which was stipulated: The balance sheets of the Bank and the affiliate at relevant dates; the earnings of the Bank and the affiliate on these dates, the dividends declared; net asset values, exclusive of goodwill and other intangibles on these dates; and the market value of the units at all times exceeded the market value of the Bank stock alone. From these stipulated facts the Board found that “it was practicable to apportion fairly the cost or market value of the unit of the Bank and Security Co. stock between the two stocks by valuing the Bank stock and subtracting that value from the value of the unit.” (p. 1164.)

In the *Appeal of Glenn H. Curtiss*, 21 B. T. A. 629-637, the Board in apportioning to new securities received on a tax-free exchange in July 1923 used as a basis sales prices on the New York Exchanges in February and April 1924.

Where, as in the present case, there is no market in the sense that the stock was dealt in by such a multitude of persons and in such large number of transactions as to fix a standard price, the Court must accept substitute proof of what price would be paid if a willing buyer and a willing seller met. The rule is well stated in *Helvering v. Kendrick Coal & Dock Co.*, 72 F. (2d) 330, where the Circuit Court of Appeals for the Eighth Circuit says (p. 333):

“To ascertain the fair market value of property, as the Treasury Regulations above quoted import, it is not necessary that the property actually shall have been sold in a market. Where personal property is sold in a definite and established market, or changes hands for money so regularly that a market price for it is created or maintained, it is obvious that it must have a fair market value. When the question arises as to its fair market value in litigation, the question merely is as to the price it commanded in the market at the particular time. Where, however, there is no such market, but the property has an intrinsic value, then the evidence must show what price that intrinsic value would command on a market where willing buyer and willing seller met.”

As was pointed out by the Circuit Court of Appeals for the Second Circuit in *Houghton v. Commissioner*, 71 F. (2d) 656, 658 (quoted *supra*), it is proper, in cases where no actual market exists, to receive as evidence of market value *appraisals* of such values by persons familiar with the securities. Likewise, the Circuit Court of Appeals for the Third Circuit, in

Heiner v. Crosby, 24 F. (2d) 191, holds that the market value of stock may be established by opinion evidence, saying (p. 193):

“The fair market price or value of stock at a particular time is a question of fact, to be determined from all the circumstances. Market price implies the existence of a market, of supply and demand, of sellers and buyers. Sales are always evidence of a market price. * * * Sales made under peculiar and unusual circumstances * * * may neither signify a fair market price or value, nor serve as the basis on which to determine the amount of gain derived from the sale. *In such cases resort must be had to evidence to determine ‘fair value’.* Offers made in good faith and opinions of intelligent men experienced in the business are admissible to show fair value.” (Emphasis supplied.)

See also the recent decision of the Supreme Court in *United States v. Miller*, 317 U.S. 369, 374, 63 S.Ct. 276, 279, 87 L. ed. 336, 343, where the Court, reviewing a condemnation award and speaking of opinion evidence, says:

“Where, for any reason, property has no market, resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with a nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. *Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in signifi-*

cant amounts, the application of this concept involves, at best, a guess by informed persons."
(Emphasis supplied.)

The evidence introduced by appellant will now be examined and will show that in the present case proof has been supplied sufficient to afford a basis for allocation within the decisions just reviewed.

(b) Appellant's evidence establishes that the unit cost should be allocated 75% to the Chase Bank stock and 25% to the Chase Securities (Amerex) stock.

To establish a basis for the allocation of the cost of the units of Chase Bank and Chase Securities stocks, appellant offered the testimony of Thomas C. Montgomery, of Washington, D. C.

Mr. Montgomery is a man of 53, with an A. B. degree and an L. L. B. degree from Harvard. He practiced law from 1914 to 1917 and in March, 1920, upon his return from World War I, went into the securities business. This has ever since been his business. He started as a salesman with Securities Sales Company of Atlanta, Georgia. In 1921 he became a securities salesman for the Equitable Trust Company of New York. Later he instituted and managed a bond department for the Guardian Trust Company of Houston, Texas. Later he went into the mortgage business in Washington with the Real Estate Mortgage and Guaranty Corporation where he stayed four years. In 1927 he participated in the formation of Waggaman, Brawner & Company, a member of the Washington Stock Exchange, to deal in investment

securities generally. In September, 1942, Waggaman, Brawner & Company merged with Ferris, Exnicios & Company, and Mr. Montgomery is presently affiliated with that firm. (Deposition, R. 35-38.)

As a part of Mr. Montgomery's business he appraised and valued stocks for others and from the early part of 1930 the appraisal and valuation of bank stocks formed a large percentage of his work. From 1930 he dealt in bank stocks right along. He watched the market especially on the New York bank stocks, the leaders, Chase, National City, Manufacturers, Irving Trust, etc. He also had experience in valuing the stocks of securities and investment companies. He testified that he was a member of the Washington Stock Exchange; that in the course of his business he had occasion to inquire into the value of and to make studies of the value of the common stock of the Chase National Bank and of the Chase Securities Corporation; that he was familiar with the values of those stocks as of the early part of 1930 and that he was familiar with the agreement preventing separate transfers of the two stocks. Having thus qualified and having in mind the restriction on separate transfers of the stocks, Mr. Montgomery testified that Chase Bank stock, independently of any value attributable to the stock of Chase Securities, had a value of \$127.88 per share on March 3, 1930, of \$124.10 per share on April 8, 1930, and of \$128.25 per share on April 24, 1930. The dates are the dates of plaintiff's purchases of the units. (Deposition, R. 38-42.) These values establish the cost of the Chase Bank stock at

75% of the unit cost as against 70% used in computing the refund claim.

Mr. Montgomery described the method followed by him in arriving at the foregoing values. He took the information available to the ordinary investor supplied by the 1931 edition of Moody's Manual of Securities of Banks and Standard and Poor's Manual, from which he found that on December 31, 1929, the date nearest the dates of purchase, the book value of Chase Bank and Chase Securities together was \$65.25 per share, of that the book value of Chase Bank alone was \$45.97 and of Chase Securities alone was \$19.28, a ratio of 69 to 31; at the end of 1930 the total book value was \$63.02, of the Bank alone \$48.35 and of the affiliate alone \$14.67, a ratio of 77 to 23. The dividend record, to which the witness gave a good deal of weight, showed the payment in 1927 and 1928 of dividends of \$18 per unit each year of which the Bank contributed \$14 and the Securities Company \$4. In 1929 the stock was split five for one. For the first three quarters of 1929 the dividends continued as in the two previous years, after the split-up the dividend basis was \$4 per year, \$3 from the Bank and \$1 from the Securities Company, a ratio of 75 to 25. The witness then testified (R. 45-46):

"In my opinion, an investor buying a bank stock, or in this case a bank and securities stock together, would look at the contribution of income from the bank and securities company and would look at the relative book values. But I, and I think the investor, would pay more attention to

the dividend income, because as I said earlier, the book value of a securities company fluctuates much more than the book value of a bank, which is relatively stable.

“I find that the dividend income for about two and a half years preceding—I have given the figures, that 78 per cent came from the bank and 22 from the securities company. In the months immediately preceding the dates of purchase of this stock the relative figures were 75 per cent from the bank and 25 from the securities company. Therefore, I would say that in my opinion the investor was paying 75 per cent of his purchase for the bank stock and 25 per cent for the securities company, and that is the basis of my figures.”

Further, on cross-examination, Mr. Montgomery, gave the earnings of the affiliated companies per share as set out in the manuals, as follows:

	Bank	Securities Co.
1928	15.87	1.69
1929 (on the new stock)	3.49	1.46
1930	not available	1.07

The ratio of earnings in 1929, the last year available to a prospective purchaser in 1930, was 70 to 30. (Deposition, R. 51-52.)

The cross-examination (Deposition, R. 49-68) thoroughly demonstrated that Mr. Montgomery was basing his opinion of relative values on the knowledge of the affairs of the corporation that would be available to the man on the street, which is essentially the knowledge that creates market value. He recognizes that others might form other opinions of value and

points out that without difference of opinion on values you have no market. (Deposition, R. 59.) He further (R. 65) disposes of the suggestion that an appraisal of the assets of the two companies would furnish a more accurate valuation, with the statement that the Bank would not have permitted such an appraisal and that such method was not used in the securities business. In that connection, it should be pointed out that to an investor who is going to buy a hundred units of Chase stock, an investment of say \$15,000 to \$20,000, such a method of valuation is unavailable both from a financial and a practical viewpoint since the combined assets of the two corporations approximated half a billion dollars. It is obvious that the trader must determine values on a practical basis and that a method considering total asset values, dividends and earnings, which is the basis upon which the unit values were fixed in the stock market, is validly used in making an apportionment of the cost of the units to the component stock.

Mr. Montgomery's testimony is uncontradicted and it is submitted his opinions as to relative values must be accepted and applied to the present case.

(c) Proper date for apportionment.

The appeal has been briefed so far on the assumption that the basis of apportionment of the cost of the Chase units was their respective values at the date of acquisition. That was the assumption in all the cases discussed and seems the logical date. However, it has been suggested, and the Commissioner's argument that the units are a single unitary investment

strengthens the validity of that suggestion, that the cost should be apportioned as of the date of the termination of the inseparable character of the unit, here June 14, 1934, when the tie-in was abolished to conform to the Banking Act.

The suggestion was first made in the dissenting opinion in the *Hagerman* case, 34 B. T. A. 1170, where it is said:

“If the unit which he bought—the bank stock with the endorsement—had been sold, gain or loss would have been computed upon its cost. But he did not sell it as a unit. He surrendered it on December 9, 1933, and, in the language of the majority, ‘in exchange therefor * * * received * * * certificates of Bank stock without said endorsements and declarations of interest.’ This, it seems to me, is analogous to the situation which the Board had before it in *Glenn H. Curtiss*, 21 B. T. A. 629. It was there held that the cost of the exchanged securities should be apportioned to the securities received in the exchange according to the respective market values of the securities at the time received in the exchange. * * *

“In *H. A. Green, supra* (33 B. T. A. 824) we pointed out that while there is no specific provision in the statute directing an apportionment of cost between two or more kinds of property received in a nontaxable exchange (which, it seems to me, is what we have here) still article 1567 of Regulations 62, interpreting the Revenue Act of 1921, must be considered as laying down a principle which is equally applicable in determining gain or loss under subsequent revenue acts. This regulation provides in part as follows:

“* * * the proportion of the original cost, or other basis, to be allocated to each class of new securities is that proportion which the *market value* of the particular class bears to the *market value* of all securities received on the date of the exchange. * * *” (Italics supplied.)

“This is certainly a more ‘practicable’ solution of our problem than that adopted by the majority.”

As the record shows, appellant *surrendered* his “unit” security on June 14, 1934, and received new certificates for 300 shares of Chase Bank stock and 30 shares of Amerex (formerly Chase Securities) stock, and if the transaction is to be likened to a tax-free exchange, the respective values of the components should be fixed as of that date. Furthermore, such treatment has the advantage, so far as valuation is concerned, of values as of that date established on an open market. The ratio as of that date is approximately 95% to Chase Bank and 5% to Amerex.

CONCLUSION.

It is submitted that the following propositions have been established:

1. That upon a sale of one of the components of a unit purchase of Chase Bank and Chase Securities stocks, after the removal of restrictions on separate transferability, gain or loss on the sale can be determined by allocating the unit cost to the respective components according to their respective values;

2. That the inseparability of the units does not prevent the stocks having independent market values;

3. That such separate values can be established by the testimony of a witness qualified to make such appraisal;

4. That the uncontradicted evidence in this case establishes that if the date of acquisition be taken for allocation, the Chase Bank stock represents 75% of the unit cost and the Chase Securities stock represents 25% of such cost;

5. That the stipulated facts in this case establish that, if the date of the dissolution of the units be taken for allocation, the Chase Bank stock represents 95% of the unit cost and the Chase Securities stock represents 5% of such cost; and

6. That the judgment appealed from should be reversed with directions to enter judgment for appellant.

Dated, San Francisco, California,

June 26, 1943.

Respectfully submitted,

WALTER SLACK,

Attorney for Appellant.

T. M. WILKINS,

Of Counsel.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

SPRECKELS-ROSEKRANS INVESTMENT

COMPANY (a corporation),

Appellant,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue of the United States for the First District of California,

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR APPELLEE.

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No. 10,739

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

SPRECKELS-ROSEKRANS INVESTMENT

COMPANY (a corporation),

Appellant,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue of the United States for the First District of California,

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR APPELLEE.

OPINION BELOW.

The District Court did not file an opinion. Its findings of fact and conclusions of law are in the record at pages 69 to 71.

JURISDICTION.

This appeal involves income taxes for the year 1936 in the amount of \$5370.56, plus interest. The taxes in controversy were paid to the appellee together with

other taxes for 1936 not in controversy on March 15, 1937; June 15, 1937; September 9, 1937, and December 23, 1937. (R. 11-12.) The claim for refund of \$5,370.56, plus interest, was filed on March 13, 1940. (R. 21.) It was rejected on October 2, 1940. (R. 33.) This action for the recovery of the taxes under the provisions of Section 24, Fifth, of the Judicial Code, as amended, was instituted on September 17, 1942. (R. 2-7.) Judgment was entered for the appellee on December 18, 1943. (R. 72-73.) Notice of appeal was filed on March 7, 1944. (R. 73.) The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

In 1930, the taxpayer purchased 300 units of Chase National Bank—Chase Securities Corporation stock, a unit consisting of one share of the bank stock and one share of the securities affiliate stock. The price paid was the price per unit. Neither stock was quoted individually. Restrictions prevented the sale of either stock other than in units. These restrictions were removed in 1934. In 1936, the taxpayer sold the 300 shares of bank stock.

(a) May any part of the unit purchase price be allocated to the bank stock so as to enable the taxpayer to claim a loss in 1936; or

(b) Must the recognition of the loss be postponed until the securities affiliate stock, purchased as a unit with the bank stock, is sold;

(c) If allocation is permitted, is there any practical basis upon which allocation can be made?

STATUTES INVOLVED.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

* * * * *

(h) *Basis for Determining Loss.*—The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), shall be the adjusted basis provided in section 113 (b) for determining the loss from the sale or other disposition of property.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * * *

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * *

STATEMENT.

In 1930, the taxpayer purchased 300 units of Chase National Bank—Chase Securities Corporation stock as follows: On March 3, 1930, 100 units at a cost of \$17,050; on April 8, 1930, 100 units at a cost of \$16,546.25, and on April 24, 1930, 100 units at a cost of \$17,100. (R. 17.) The 300 units thus cost \$50,696.25.

Each unit consisted of one share of the stock of the Chase National Bank and one share of the stock of the Chase Securities Corporation. (R. 17.) The ownership of the securities was evidenced by instruments the opposite sides of which consisted of executed certificates of stock of each corporation together with legends stamped thereon referring to the original instruments and agreements pursuant to which the Chase Securities Corporation was organized. (R. 17-20.)

The Chase National Bank was organized in 1877. In 1917, it caused the Chase Securities Corporation to be organized for the purpose of dealing in securities with which the law prohibited the bank to deal. (R. 12.)

In connection with the organization of the securities affiliate, the bank caused a special dividend of \$2,500,000 to be declared and transferred to the affiliate in return for the issuance by the affiliate of all its capital stock pro-rata to the stockholders of the bank. (R. 12.) The stockholders of the bank surrendered their stock certificates and in return received instruments with the certificates of stock in the bank and the securities corporation on opposite sides of the same paper. (R. 13.)

The agreement pursuant to which the securities company was organized provided that it could be modified, amended, or terminated by the vote of 75 percent of the shares of both the bank and the securities company. Later, the provision requiring a vote of 75

percent of the shareholders of each corporation was changed to 66 2/3 percent. (R. 13.)

Under the agreement pursuant to which the securities corporation was organized, the stock of the Chase National Bank and the stock of the Chase Securities Corporation could not be purchased or sold separately, but could only be sold in units consisting of one share of stock of each corporation. (R. 14.) Thus, until June 14, 1934, when this arrangement, as will appear below, was terminated, neither the stock of the Chase National Bank or the stock of the Chase Securities Corporation was quoted or sold separately. (R. 14.)

The quotations on the market with respect to the stock interests in the bank and the securities corporation was always in terms of a share of stock of the Chase National Bank. The bid for such a share of Chase National Bank stock constituted the price bid, asked or paid for a unit consisting of one share of the bank stock and one share of the securities corporation. (R. 14.)

As a consequence of the passage of the Federal Banking Act of 1933, requiring the separation of national banks from their securities affiliates, the arrangement subsisting between the bank and the securities corporation was terminated by an agreement dated June 14, 1934. (R. 16.) As part of the agreement, the certificate of incorporation of the Chase Securities Corporation was changed by eliminating therefrom all provisions preventing the separate sale or transfer of shares of stock without the transfer

of a like number of shares of the bank stock.¹ (R. 16.) The agreement also provided for the change of name to Amerex Holding Corporation.² (R. 17.)

On and after June 15, 1934, but not prior thereto, the stock of the securities corporation was quoted separately from the stock of the bank. (R. 17.)

For the period of June 1, 1934, to June 13, 1934, just prior to the removal of the restrictions on the separate sale of the stock, the bid quotation of units of the Chase National Bank—Chase Securities Corporation stock ranged from 27 to 28 3/4 and the asked quotation ranged from 28 1/2 to 30 1/4. (R. 14-15.) For the period of June 14, 1934, to June 30, 1934, that is, after the removal of the restriction, the bid quotations for the Chase Bank stock alone ranged from 26 to 27 1/2 and the asked quotations ranged from 27 1/2 to 29. (R. 15.) During this same period, the over-the-counter market showed bid quotations for the securities corporation stock³ ranging from 13 1/2 to 14 3/4 and asked quotations ranging from 14 1/4 to 15 1/8. (R. 16.)

¹The agreement of June 14, 1934, also provided that the number of shares of the securities corporation was to be reduced so that each 10 shares of stock of the corporation then outstanding became only one share of the stock of the corporation. (R. 17.)

²For the sake of simplicity, the name Amerex Holding Corporation will not be further used in the brief, but the corporation will continue to be designated as Chase Securities Corporation or the securities corporation.

³Each share was the equivalent of ten shares prior to the agreement of June 14, 1934.

On December 22, 1936, the taxpayer sold its 300 shares of bank stock (but retained its securities company stock). (R. 21.) The taxpayer asserted a loss of \$2,005.23 on said sale. (R. 21.) The taxpayer arrived at this amount by assigning⁴ as a basis to the bank stock, 70 percent of the cost of the unit of Chase Bank—Chase Securities stock purchased by it in 1930, the remaining 30 percent being designated as the basis of the securities corporation stock (R. 5, 29), and subtracting from the basis of this bank stock the amount realized upon the sale of the same.⁵ However, the asserted loss of \$22,055.23 was not claimed as a deduction in the taxpayer's 1936 return (R. 12) and on March 13, 1940, the taxpayer filed a claim for refund in the sum of \$5370.56 (R. 21) alleging that it is the amount of taxes overpaid for 1936 by reason of the failure to deduct the asserted loss of \$22,005.23 in its 1936 tax return. The claim for refund was rejected on October 2, 1940. (R. 33.) This action was commenced on September 17, 1942, and was decided adversely to the taxpayer on December 13, 1943. (R. 71.)

⁴The attempted allocation of basis was made after the sale of the bank stock. The record is silent as to any allocation made upon the books and records of the taxpayer at the time the units were purchased in 1930.

⁵\$13,482.15. (R. 18.)

SUMMARY OF ARGUMENT.

The taxpayer made a single investment in units of Chase National Bank—Chase Securities Corporation stock. The price per unit was quoted as the price of Chase Bank stock. Acquisition of Chase Securities Corporation stock was merely an incident in the purchase of the bank stock. Neither stock could be purchased or sold separately until 1934 when the restriction against separate sale was removed. Since the shares were purchased in units as a single investment, no loss could be realized when the bank stock alone was sold. Gain or loss may be determined only when both stocks are sold.

Neither statutes nor regulations provide for the allocation of the cost of units of bank-securities affiliate stocks between the two. Since income taxation is statutory, this right does not exist and cannot be created by analogy. Even if the right to allocate did exist, there is no basis upon which allocation can be made in this case without resorting to guess work. By waiting until both stocks are sold, the exact amount of tax liability can be determined.

The question is not *whether* the taxpayer shall be allowed a loss, but *when* such loss may be claimed.

ARGUMENT.

I.

THE TAXPAYER MADE A SINGLE AND UNALLOCATED INVESTMENT IN CHASE NATIONAL BANK—CHASE SECURITIES CORPORATION STOCK AND NO LOSS IS REALIZABLE UNTIL BOTH ITEMS OF THE INVESTMENT ARE DISPOSED OF.

The ultimate question in this case is not *whether* the taxpayer shall be allowed the loss it now seeks to assert, but rather *when* that loss may be asserted. It is the position of the Government that, in every real sense, the taxpayer made but a single investment in the stock of the bank and its securities affiliate and that both must be disposed of before any loss may be recognized.

In 1930, when the taxpayer purchased his units of Chase Bank—Chase Securities stock, neither security was purchasable or transferable alone. In fact, the securities corporation stock was considered merely an incident in the ownership of the bank stock.⁶ This is demonstrated by the fact that the price of a unit of one share of Chase Bank and one share of Chase Securities stock was quoted only in terms of one share of Chase Bank stock. (R. 14.) The acquisition of the securities stock was merely an incident in the purchase of the bank stock and the taxpayer did not contemplate mak-

⁶See testimony of Thomas C. Montgomery. (R. 61.)

ing two separate investments when the Chase Bank—Chase Securities stock was purchased in 1930.⁷

That the investing public should have considered the investment in Chase Bank stock a single investment in the bank and securities affiliate stock is logical and consistent with the history and purpose of the two corporations. The Chase National Bank was an old and well established institution. However, it was barred by law from dealing in certain securities. Hence, in 1917, Chase, like so many other banking institutions before and after that year, decided to take advantage of the securities market by organizing a securities affiliate, the profits of which would flow to the stockholders of the bank. To this end, the Chase Bank declared a special dividend of \$2,500,000. This became the capital of the securities affiliate (R. 12), and the stock of the affiliate was issued pro rata and directly to the stockholders of the bank (on the opposite of the bank stock certificate). There was thus a unity of ownership and a unity of management. Even the dividends of the two corporations were paid as a unit.⁸ Neither stock could be sold or transferred alone. In a very real and practical sense, the securities affiliate was a wholly owned, controlled and managed subsidiary of the Chase Bank.

⁷In fact, as stated, the record is silent as to any allocation of investment between the two securities at the time of purchase on the books of the corporation or otherwise. Presumably, therefore, no such allocation was made.

⁸See testimony of Thomas C. Montgomery. (R. 43.)

This unity of interest and singleness of investment is demonstrated retrospectively when it is remembered that the "separation" occurred only because the Federal Banking Act of 1933⁹ required national banks to divest themselves of their securities affiliates. In the case of the Chase Bank—Chase Securities affiliation, the net effect of the Banking Act of 1933 was to require the removal of the restriction against the separate sale or transfer of either stock. But there was nothing in the Banking Act which required the stockholders to divest themselves of either of the two stocks! Nothing in the Banking Act required a division of the investment! The single investment was not converted into a twin investment by the Act, nor did the taxpayer sell its bank stock immediately upon the removal of the restriction against separate sale. The investment was single when originally made and continues single until both stocks are disposed of.

In *De Coppet v. Helvering*, 108 F. (2d) 787 (C.C.A. 2), certiorari denied, 310 U.S. 646, the Court had under consideration an appeal from the Board of Tax Appeals decision involving a bank and securities affiliate similar to those involved in this case. The Court held the investment to be single and refused to permit loss to be realized when the value of the securities affiliate shares become extinct but held that loss would be realized only when the full investment was disposed of. The Court said (pp. 788-789):

Hence it would certainly have made a great difference how the investment shares were held,

⁹c. 89, 48 Stat. 162.

if they were not locked to the bank shares. But they were; it was impossible to sell them without selling the bank shares, or to sell the bank shares without selling them. We do not say that no differences can be conjured up between the legal form chosen and the usual share holding of a subsidiary; but they are immaterial to the subject at hand. The beneficial interest was as much an appurtenance of the bank shares as an easement is of the servient tenements; it merely gave them an added value, precisely as it would have done, had the Bank been the shareholder. Collectively the same persons must always be equitable owners of the investment shares and shareholders of the Bank, and in the same proportion; there never could be one group holding bank shares, and another holding investment shares. So far as a corporation is the aggregate of its shareholders in respect to their collective rights and obligations, there was but one corporation.

* * * * *

The important matter is not what formal legal differences there were between the model adopted and the ordinary case of a corporate subsidiary; but whether the investment was single. It was if the investor could not have dealt with the parts separately; and these investors could not. When we speak of an investment, we do not think of the various ventures in which the company may be engaged, or of the various properties it may hold. We think of the unity which we must deal with as such, regardless of the particular legal paraphernalia in which it is clad. It is from that background that section 23 (c) (2) speaks, and the Board was right in holding that here there was but a single investment.

In *Commissioner v. Hagerman*, 102 F. (2d) 281 (C.C.A. 3), affirming the decision of the Board of Tax Appeals, 34 B.T.A. 1158, wherein apportionment of cost between the bank and securities affiliate shares was permitted, and upon which the taxpayer relies very heavily in this case, practically no consideration was given to the question of the singleness of the investment, and hence the case can not be regarded as authority with respect to the issue under discussion. See *United States v. Mitchell*, 271 U.S. 9. In fact the Second Circuit, in the *De Coppet* case, *supra*, expressly stated (p. 789) that it does not regard the *Hagerman* decision as authoritative.

In light of the foregoing discussion, it is evident that the taxpayer seeks to break a single investment into two investments for the purpose of avoiding taxes in the year in question. Courts have often held that a single transaction may not be broken up into various elements to avoid a tax. Cf. *Moore v. N.Y. Cotton Exchange*, 270 U.S. 593; *Du Pont v. Deputy*, 23 F. Supp. 33 (Del.).

The trial judge was entirely correct when he held that the taxpayer's investment was single and that no loss is allowable until both stocks are sold. (R. 70-71.) Moreover, the taxpayer will not be injured by waiting until he disposes of his securities corporation stock in order to determine precisely the amount of gain or loss upon the closed and completed transaction. Waiting will eliminate the necessity for determining the tax liability through the use of artificial or fictitious values and will result in accurate and precise

computation. *Pierce v. United States*, 49 F. Supp. 324 (C. Cls.). As stated earlier, the question is not *whether* the taxpayer shall be allowed his loss, but *when!* *Moore v. Hoey*, 31 F. Supp. 478 (S.D.N.Y.).

II.

NO LOSS IS ALLOWABLE ON THE SALE OF THE BANK STOCK BECAUSE THE COST BASIS CANNOT BE APPORTIONED BETWEEN THE BANK AND THE SECURITIES CORPORATION STOCK.

Section 23 (f) of the Revenue Act of 1936, *supra*, authorizes deductions of losses sustained by corporations and subdivision (h) of that section provides that the basis for determining the amount of the deduction should be the adjusted basis provided in Section 113 (b), *supra*, for determining gain or loss upon the sale or other disposition of property. Section 113 (b) provides that the adjusted basis shall be the basis under subdivision (a) of that section with certain adjustments, and subdivision (a) provides that the basis shall be cost with certain exceptions.

There is no specific provision in the Revenue Act of 1936 or in the Treasury Regulations promulgated thereunder which authorizes apportionment of the cost basis in a case such as the present one. Since the law of income taxation is entirely statutory, the taxpayer recognizes that it is hard put to establish a legal right to apportionment and, therefore, resorts to an argument based on analogy. (Br. 12-17.) The taxpayer contends that because apportionment is required or permitted by statute or regulations in cer-

tain situations, apportionment should be permitted here.

The principle of creating rights or liabilities in a given federal tax situation not covered by statute by relying on the law governing similar but not the identical situation was rejected by the Third Circuit Court of Appeals in *Commissioner v. Douglas*, decided on July 10, 1944 (1944 P-H, par. 62,648). In this case it was argued that an attempt was being made to import into an estate tax situation the law relating to income tax liability applicable to similar facts. The Court said:

To impose liability we should have to transfer the case law on the concept of constructive receipt, which has grown up under the different terminology of section 167 of the income tax law, over to section 302 (c) of the estate tax law. The suggestion has a certain smooth plausibility. If the fruit can be taxed to the settlor as income, why may not the tree be taxed to his estate? The answer is that Congress has imposed liability for estate tax and income tax in different language.
* * * If this addition to the tax law is to be made, the Congress, not the courts should make it.

Thus, the fact that the regulations¹⁰ provide for the apportionment of cost between depreciable and non-depreciable assets acquired for a lump sum (Br. 12), or permit¹¹ apportionment where two different

¹⁰Treasury Regulations 111, promulgated under the Internal Revenue Code, Section 29.23 (1)-4.

¹¹Treasury Regulations 62, promulgated under the Revenue Act of 1921, Article 1567; also, Section 113 (a) (6), Internal Revenue Code.

kinds of property are acquired in a tax free exchange (Br. 13),¹² or permit apportionment where common stock is received as a bonus¹³ (Br. 15), or permit apportionment where real estate is purchased for the purpose of subdividing into lots¹⁴ (Br. 16), or permit apportionment of discovery value between land and natural resources¹⁵ (Br. 16), or permit allocation of cost of production of different products produced by a single process¹⁶ (Br. 17) is hardly a reason for permitting an artificial severance of a single investment into its elements where no statute or

¹²The quoted portion of Article 1567, Regulations 62, omits the very significant language preceding the part quoted, to wit:

If no fair apportionment is practicable, no profit on any subsequent sale of any part of the property received in exchange is realized until out of the proceeds of sale shall have been recovered the entire cost of the original property.

Thus, even though apportionment is permitted in principle, it must be demonstrated that it is practicable. Moreover, *Curtiss v. Commissioner*, 21 B.T.A. 629, affirmed, 57 F. (2d) 847 (C.C.A. 5th), cited on page 13 of the taxpayer's brief, in which the regulation was applied, is totally different from this case because the *Curtiss* case, *supra*, involved an exchange of securities of different types. In this case, there was no exchange. All that occurred was that the restriction against the separate sale of the stocks was removed.

¹³Treasury Regulations 111, Section 29.22 (a)-8. Here, too, while apportionment is permitted, it must also be practical.

¹⁴Treasury Regulations 111, Section 29.22 (a)-11.

¹⁵Treasury Regulations 111, Section 29.23 (m)-3; Section 29.23 (m)-27.

¹⁶Treasury Regulations 111, Sec. 29.22 (c)-7.

regulation gives the taxpayer the right. Each of the instances in which apportionment or allocation is permitted by statute or regulation involves a situation quite different from that of a single investment in two inseparable stocks. Thus, even if the right to apportionment could be predicated upon analogy—and it can not—the analogies are weak indeed!

Assuming for the sake of argument that the statutes or regulations permitted apportionment, the very difficult problem of affecting an apportionment of the single investment arises. This practical difficulty is silhouetted by the inconsistent position taken by the taxpayer with respect to what a proper allocation of the cost should be. In the taxpayer's claim for refund (R. 22-23) and in the complaint (R. 2-7), an allocation on the basis of 70 per cent for the bank stock and 30 per cent for the securities affiliate is urged, and the amount of taxes claimed as a refund is computed on this basis. But the taxpayer's expert witness, Thomas C. Montgomery, testified (R. 62) that the allocation should be 75 per cent to the bank stock and 25 per cent to the securities affiliate, and the taxpayer in its brief (p. 38) adopts this allocation, and presumably chooses to forget about the 70-30 per cent allocation upon which the claim for refund was founded and the complaint based.¹⁷ The taxpayer's brief refers (pp. 39-40) to this change in allocation in a rather off-hand manner. Presumably, the inconsistency is too dangerous to the taxpayer's position to dwell upon!

¹⁷The taxpayer has not amended its complaint or recomputed the amount of taxes claimed as a refund.

The situation is analogous to that in *Pierce v. United States*, 49 F. Supp. 324 (C. Cls.), involving the identical question presented in this case where the Court said (p. 330):

* * * plaintiffs' witness suggested values widely different from those arrived at by the plaintiffs' other method. Either of these methods seems plausible to us, as a rough guess at a value that might be attributed. But we do not think that the situation calls for such a rough estimate, when by patience the exact answer may be obtained.
* * *

Not only do the conflicting formulae for allocation submitted by the taxpayer indicate the impracticability of equitably allocating the cost between the two stocks, but an examination of each individual proposal for allocation indicates that they are based upon guess work.

The method used in arriving at the 70-30 percent allocation is set forth in the claim for refund. (R. 22-33.) It revolves about a comparison of the net worths of the bank and the securities affiliate as of December 31, 1929, and a comparison of the earnings of the bank and the securities corporation for the period 1924 to 1929. But information as to 1929 or prior years can have little bearing upon values in 1930 when the taxpayer purchased his Chase Bank—Chase Securities stock. The Court will take judicial notice of the fact that the market broke in 1929, that values crashed and earnings declined precipitously, that 1930 was the beginning of a period of complete demoralization in the securities field. In view of the

financial chaos which broke upon the nation in the fall of 1929, no standard of comparison applicable to the prosperous years prior to 1929 can be valid for 1930. This is particularly true when it is remembered that the securities affiliate, by reason of the fact that it dealt solely in securities, no doubt suffered proportionately much greater losses in 1930 than the bank.

If the comparative earnings statement (R. 31) is examined, a greater fluctuation in comparative percentages for the years 1924 to 1929 is revealed. In view of such fluctuations, an average is hardly a fair indication of potential or comparative earnings. For 1929, the year most proximate to that in which the taxpayer purchased the Chase Bank—Chase Securities stock, the comparative earnings are given as 76.013 percent to the bank and 23.989 percent to the securities company, and yet, for 1930, the taxpayer ascribes an allocation of value of 70-30 percent. This is a *non-sequitur*; it is sheer guess work.

Because of the financial history of 1929 and 1930, a comparison of net worths as of December 31, 1929, is illusory and deceptive. Only a detailed statement showing all the items in the balance sheet valued at their then market value, would enable a correct computation of net worth.¹⁸ Such an analysis was not made by the taxpayer. The net worth statements used

¹⁸It is well known that book values are often arbitrary, and bear but slight relation to the facts. Book value and market value are therefore not necessarily synonymous. 10 Mertens, Law of Federal Income Taxation, Section 59.14, p. 467.

for comparative purposes were those published as of December 31, 1929. It is generally recognized that published statements of banks and other corporations seldom provide sufficient information upon which to base an intelligent opinion of value, and this would be particularly true of a securities corporation statement published on December 31, 1929.

The testimony of Thomas C. Montgomery and the basis of the allocation made by him is subject to the foregoing as well as additional weaknesses. He admits that the investor "was buying a unit and he was paying more attention to Chase Bank than he was to the securities company". (R. 61.) He admits that his allocation may not be mathematically exact. (R. 58.) He predicated his estimate of comparative values on the book values of the respective stocks as of December 31, 1929, and December 31, 1930 (R. 42), and upon the dividend records of the bank and the securities affiliate. (R. 43.) The proportionate percentage of the book value of the securities corporation was 31 percent at the end of 1929 and 23 percent at the end of 1930. (R. 42.) He did not know whether the book values of the securities owned reflected market values, but assumed so. (R. 55.) He had no information proximate to the three dates in 1930 when the taxpayer made his purchases. (R. 56-57.) He admitted that if information were available as of the dates of purchase, a different allocation might be necessary. (R. 57.)

The bank itself issued no statement of earnings, but financial services published what in their opinions

constituted statements of earnings. (R. 51.) However, no statement of the bank's earnings for 1930 were published because a merger involving the bank prevented ascertainment of the earnings. (R. 51.) The actual earnings of the securities company were less than the dividends paid, and Montgomery thought the difference was paid out of surplus but was not sure. (R. 52.)

Nothing in Montgomery's testimony indicates that he took into consideration the deflation that occurred after 1929. Montgomery also did not take into consideration, in making the allocation, the fact that it was the tie-up with the Chase Bank that gave real value to Chase Securities Corporation stock, although he admitted that it was a great factor in determining the value of the unit. (R. 60, 61.)

Montgomery also admitted that any attempt to allocate market values to the separate stocks in 1930 was highly theoretical because there was no separate market for each stock in 1930. (R. 62.)

All in all, a fair reading of Montgomery's testimony shows that he was guessing.¹⁹ The result of his guess was different from that upon which the taxpayer has predicated its case. Income taxation is more than a matter of guessing. Moreover, there is

¹⁹Opinion evidence, even if not contradicted, is not necessarily conclusive. The facts upon which the opinion is based must corroborate the opinion. See *Joseph S. Wells Ass'n v. Helvering*, 71 F. (2d) 977 (App. D.C.); *Balaban & Katz Corp. v. Commissioner*, 30 F. (2d) 807 (C.C.A. 7th); *Dayton P. & L. Co. v. Comm'n*, 292 U. S. 290.

no need to guess in this case where by a little patience, by waiting until both stocks are sold, the exact gain or loss will be known and the proper tax liability determined.

The great weakness in the taxpayer's position is that it seeks to establish a fair market value for securities that could not have any separate market values, since neither stock could be sold separately. Where an effort is made to establish the intrinsic value of stock, the same value cannot be ascribed to restricted stock as to stock which can freely be disposed of by its owner. See *Helvering v. Tex-Penn Co.*, 300 U.S. 481, affirming 83 F. (2d) 518 (C.C.A. 3); *Propper v. Commissioner*, 89 F. (2d) 617 (C.C.A. 2); *Schuh Trading Co. v. Commissioner*, 95 F. (2d) 404 (C.C.A. 7); *Hudson Motor Car Co. v. United States*, 3 F. Supp. 834.²⁰ In those cases where it has been held practical to allocate a basis between two kinds of property, such allocation has been made according to the respective market values of the

²⁰See concurring opinion in which it is stated (p. 147):

I concur with the foregoing opinion that the stock delivered to the employees had no fair market value or in fact any market value at all, because it could not be sold in the market without giving the company an opportunity to purchase it at much less than the regular market price. When we speak of the market value of the stock, we mean the selling price of stock upon which there are no restrictions as to sale. Nor do I think that the plaintiff is entitled to a deduction in the amount of the book value of the stock, for the book value is not a measure of actual value.

properties at the critical dates and where the properties were such that each had an independent market value. See *Taylor v. Commissioner*, 70 F. (2d) 619 (C.C.A. 2), affirmed, 293 U.S. 507; *Houghton v. Commissioner*, 71 F. (2d) 656 (C.C.A. 2), certiorari denied, 293 U.S. 608; *Curtiss v. Commissioner*, 57 F. (2d) 847 (C.C.A. 5); *Salvage v. Commissioner*, 76 F. (2d) 112 (C.C.A. 2), affirmed, 297 U.S. 106. In the present case, since neither stock could be disposed of separately, neither could have a market value.

Because of the difficulties of apportionment and the problems involved, the weight of authority is that apportionment is not permitted where bank stock and securities affiliate stock or interests are purchased as an inseparable unit. *De Coppet v. Helvering*, 108 F. (2d) 787 (C.C.A. 2); *Wise v. Commissioner*, 109 F. (2d) 614 (C.C.A. 3); *Pierce v. United States*, 49 F. Supp. 324 (C. Cls.); *Moore v. Hoey*, 31 F. Supp. 478 (S.D.N.Y.); *Barber Securities Corp. v. Commissioner*, 45 B.T.A. 521; *Orvilletta, Inc. v. Commissioner*, 47 B.T.A. 10.

The only case cited by the taxpayer in which apportionment was permitted with respect to the cost of bank and securities affiliate stock is *Hagerman v. Commissioner*, 34 B.T.A. 1158, affirmed, 102 F. (2d) 281 (C.C.A. 3). The Circuit Court affirmed on the basis of the Board's decision.

The taxpayer, in its brief, has tried to distinguish the *Hagerman* case, *supra*, from the other cases and show that the *Hagerman* principle of apportionment would have been applicable in the other cases if the

proof had been the same. It is submitted, however, that a fair reading of all of the cases does not permit a distinction upon any substantial basis. The Second Circuit in the *De Coppet* case, *supra*, was unable to distinguish between the issues involved in the *Hagerman* and *De Coppet* cases, *supra*, and its comments on this point are most persuasive (p. 789):

In *Hagerman v. Commissioner*, 34 B.T.A. 1158, affirmed 3 Cir., 102 F. 2d 281, the facts were not quite the same, though near enough to be a precedent if either tribunal consciously meant to decide the point. It is somewhat difficult to know whether that was the case; the discussion turned chiefly upon whether it was "practicable" to ascertain the "basis" of the exchange, though the opinion of the minority certainly skirted very close to what we are deciding. The majority opinion of the Board here attempted to distinguish the case on the ground that the two interests were severed by an exchange; but we cannot agree that that was vital. Unless the shareholder's interest in the quasi-subsidiary was separate before its dissolution in the sense that a true subsidiary's is not; that is, unless there had always been two investments, the exchange could not have "realized" a loss. Since it was held to have done so, the case can be distinguished, if at all, only because the point was not mooted. In any event, however understood, we do not regard the decision as authoritative.

Similarly the Court in *Pierce v. United States*, *supra*, was unable to see the distinction and said (pp. 330-331):

The then Board of Tax Appeals, now the Tax Court of the United States, in *Hagerman v. Commissioner*, 34 B.T.A. 1158, reached a conclusion opposite to ours, and its decision was affirmed by the Circuit Court of Appeals for the Third Circuit, 102 F. 2d 281. But the Board in the *De Coppet* case, 38 B.T.A. 1381, and the Circuit Court of Appeals for the Third Circuit in reviewing one of the cases consolidated, in the Board proceeding, with the *De Coppet* case, held as we hold, that apportionment was not practicable and no deductible loss could be taken. *Wise v. Commissioner*, 3 Cir., 109 F. 2d 614. Both the Board and the Court said that the *Hagerman* case, *supra*, was distinguishable, but we do not see any material distinction.

It thus appears that the *Hagerman* case, *supra*, upon which the taxpayer relies so heavily, stands alone. As the same issue was involved in all the bank—securities affiliate cases cited above, it seems clear that the decision of the Board of Tax Appeals in the *Hagerman* case, *supra*, was not sufficiently elastic to apply to all taxpayers similarly situated. On the other hand, the rule adopted in all the other cases, namely, to hold in suspension the determination of gain or loss until disposition has been made of the entire unit, would result in the same treatment being accorded all taxpayers in a similar situation and permit a precise determination of the gain realized or loss sustained upon the complete transaction.²¹

²¹At the conclusion of taxpayer's brief it is suggested that perhaps the proper date for apportionment is June 14, 1934, when the inseparable character of the unit is terminated. It is conceded, however, by

CONCLUSION.

It is submitted that the Commissioner was correct in refusing to permit apportionment of the single investment in units of Chase Bank—Chase Securities Corporation stock and the District Court was likewise correct in adopting a similar position. The judgment of the District Court should therefore be affirmed.

Dated, August 16, 1944.

Respectfully submitted,

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the taxpayer (Br. 42) that the more logical date is the date of purchase. Since basis for determining gain or loss involves cost, if apportionment were permitted, it would have to be an apportionment of cost. Moreover, this suggested alternative date for apportionment is raised for the first time now on appeal. It was not presented in the claim for refund or in the Court below and hence cannot be considered here.

No. 10,739

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SPRECKELS-ROSEKRANS INVESTMENT COM-
PANY (a corporation),

Appellant,

VS.

JOHN V. LEWIS, former Collector of In-
ternal Revenue of the United States for
the First District of California,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

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PAUL P. O'BRIEN,
CLERK

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No. 10,739

IN THE
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SPRECKELS-ROSEKRANS INVESTMENT COM-
PANY (a corporation),

Appellant,

vs.

JOHN V. LEWIS, former Collector of In-
ternal Revenue of the United States for
the First District of California,

Appellee.

APPELLANT'S REPLY BRIEF.

APPELLEE'S POINTS.

The appellee in his brief makes two points in support of the affirmance of the judgment below: (1) that the taxpayer's investment being single, gain or loss may be determined only when the entire investment is sold, and (2) that neither the statute nor the regulations provide for the allocation of the costs of units of bank-securities affiliate stocks between the two. These two points will be answered in the order in which they were advanced.

I. THE FACT THAT AN INVESTMENT IS SINGLE AND THE COST UNALLOCATED BY THE TAXPAYER IS INOPERATIVE TO CONTROL THE RECOGNITION OF GAIN OR LOSS WHEN SUBSEQUENTLY THE INVESTMENT CEASES TO BE SINGLE AND THE COST CAN BE ALLOCATED.

Appellee argues that since the taxpayer made a single and unallocated investment, it cannot claim a loss when subsequently the investment ceases to be single and the cost can be allocated, relying upon the authority of the case of *deCoppet v. Helvering*, 108 F. (2d) 787. While it is true that this reason was assigned for the affirmance by the Circuit Court of Appeals of the Board of Tax Appeals' decision in the *deCoppet* appeal, it was not the basis for the decision of the Board which had held that the taxpayer could not claim a loss on the liquidation of a bank affiliate which was dissolved without assets and without distribution of its shares because of the involved transactions surrounding the acquisition of the interests by the taxpayer. And while it is true that the Circuit Court of Appeals for the Second Circuit said that it was unable to distinguish between the issues involved in the *Hagerman* and *deCoppet* cases, the Circuit Court of Appeals for the Third Circuit, in *Wise v. Commissioner*, 109 F. (2d) 614, involving the same decision of the Board, the appeal of *Wise* having been consolidated with the appeal of *deCoppet* for trial before the Board, likewise affirmed, but found no conflict with the *Hagerman* decision.

The Commissioner of Internal Revenue would be the last person to urge that because a taxpayer had purchased, as a unit, land, buildings and machinery

constituting a single factory, and had failed to make any allocation on his books of the cost as between land, buildings or machinery, no such allocation could be made upon the future disposition of separate portions of the factory. The sole purpose throughout the statute and the regulations of providing for allocations is because the investments in the first instance are single and unallocated; otherwise there would be no occasion for the provisions, and it is idle to argue that allocation cannot be made merely because the investment is single.

Furthermore, if appellee is right in regarding the purchase transaction as the acquisition of a single investment or unitary interest, it then follows that upon the termination of that character and the receipt by appellant of two separate stocks (300 shares of Bank stock and 30 shares of Amerex stock), the base date must be the date of such reissue and the values at that date furnish the basis of apportionment, for the situation is then analogous to that which arises when upon reorganization two different classes of stock are received for the surrender of a stock previously held. That being the character of the transaction, the respective values as of the date of the reissue are furnished by actual market quotations (R. 14-15), and the ratio becomes 95% of cost for the Bank stock and 5% for the former Securities stock. This aspect of the case will be discussed later.

It is submitted that appellee's argument under this head does not answer the problem before the Court, but merely begs it.

II. THE COST OF THE UNITS OF BANK AND SECURITIES STOCK CAN BE APPORTIONED.

- (a) The statute requires the recognition of gain or loss unless otherwise expressly provided.

Appellee first argues that apportionment cannot be made between the Bank and the Securities stock because there is no authority therefor either in the statute nor in the regulations. His argument fails at the outset through his ignoring the provision of section 112 of the Revenue Act of 1936, which provides:

“(a) **General Rule.**—Upon the sale or exchange of property the entire amount of the gain or loss determined under section 111 shall be recognized except as hereinafter provided in this section.”

The statute being general, the loss must be recognized unless the statute specifically provides for a postponement of such recognition. The statute nowhere so provides. It follows that if an apportionment is necessary in order that a loss may be recognized, such apportionment is required. Appellee, in a note on page 17 of his brief, quotes from a portion of Article 1567 of Regulation 62, providing for the allocation of cost where securities of a single class are exchanged for securities of different classes, so that no gain or loss is realized, the following language:

“If no fair apportionment is practicable, no *profit* on any subsequent sale of any part of the property received in exchange is realized until out of the proceeds of sale shall have been recovered the entire cost of the original property.” (Emphasis supplied.)

A similar provision is contained in Article 22(a)-8 of Regulations 94, under the 1936 Act, relating to the receipt of common stock as a bonus on the purchase of preferred stock.

“Art. 22(a)-8. *Sale of stock and rights.*— * * * If common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, *but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost.*” (Emphasis supplied.)

In both instances it will be noted that the general rule announced is that the original cost or total purchase price is to be allocated or fairly apportioned between the resulting stocks and that only in the event such apportionment is found to be impracticable “*no profit on any subsequent sale * * * is realized*” until the entire cost of the original property is recovered. Nothing is said about the recognition of *loss*. In view of the positive provision of section 112 of the Revenue Act of 1936 that loss shall be recognized and the meticulous care with which the Treasury Regulations are drafted, it cannot be assumed that the failure to include *losses* in the articles referred to was unintentional, so that exception to the rule announced in the articles is by their own language absolutely inapplicable to the present case where a loss is involved.

Appellee makes the mistake in referring to the various regulations cited by appellant upon the subject of the possibility of apportionment in assuming and arguing that appellant relies upon these sections as supporting, by analogy, the right to apportionment in the present case. These sections are cited not as controlling the right to apportionment, but as showing that the practice of apportionment of cost runs throughout the entire body of the revenue law, and that where a taxpayer establishes a basis for apportionment he is entitled to such apportionment, if necessary, for the proper determination of his income tax liability.

(b) Appellee's evidence supported apportionment.

Appellee questions the sufficiency of appellant's evidence to support apportionment in the present case and cites the fact that while the evidence in support of the refund claim based upon comparative earnings and net worth of the Bank and its affiliate resulted in an allocation of 70% of cost to the Bank stock, and 30% to the affiliate, the testimony of Montgomery resulted in an allocation of 75% to the bank and 25% to the affiliate. Appellee does not question the qualification of Montgomery to give expert testimony as to the value of the component stocks at the date of acquisition, and the fact that his method of valuation based upon dividends so closely approximates the result obtained by the method of comparison of earnings and net worth supports rather than detracts from the weight of his testimony. Montgomery was giving an apportionment on the only basis that an

individual buyer of 300 units could use, since it is obvious, as was pointed out in the opening brief (p. 40), that a small investor cannot have an appraisal made of the assets of a bank and its affiliate, or an audit made of its earnings.

Nor is it any answer to Montgomery's testimony to characterize it as "guessing". (Appellee's Brief, p. 22.) After all, that term can be applied to all opinion evidence of value not based on actual sales, and yet it is established beyond contradiction that such evidence can and *must* be accepted where proof of value is necessary to the determination of legal rights. The Supreme Court in *United States v. Miller*, 317 U. S. 369, 374, 63 S. Ct. 276, 279, 87 L. ed. 336, 343, reviewing a condemnation award and speaking of opinion evidence, says:

"Where, for any reason, property has no market resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety. It is usually said that market value is what a willing buyer would pay in cash to a willing seller. *Where the property taken, and that in its vicinity, has not in fact been sold within recent times, or in significant amounts, the application of this concept involves, at best, a guess by informed persons.*" (Emphasis supplied.)

Such being the case the Trial Court, having before it the uncontradicted testimony of a qualified witness as to value, cannot disregard such testimony or evade a decision as to the values testified to by a finding that

apportionment was impracticable. It is submitted that for the purposes of this case it is established that the respective bases of the two stocks at the dates of acquisition were 75% of the cost for the bank stock, and 25% for the securities stock.

(c) *Hagerman* case not the only authority for apportionment.

On pages 17 to 26 of its opening brief, appellant has discussed the right to apportion cost or other basis of property acquired as a single investment in the determination of liability for federal income taxes and has there demonstrated that the cases in which such apportionment was refused, being the cases relied upon by appellee in his brief, are clearly distinguishable from the *Hagerman* case in that the testimony was insufficient for some reason or other to furnish the basis for such apportionment. In that connection an interesting sidelight on human nature is found in the fact that where a taxpayer is claiming a loss under the circumstances similar to those in the present case, the Commissioner of Internal Revenue almost uniformly argues that apportionment is improper or impracticable, while, when a profit arises from such a transaction, he is quite as positive that apportionment is both proper and practicable.

Typical of such cases is *Taylor v. Commissioner*, 70 F. (2d) 619 (affirmed: *Helvering v. Taylor*, 293 U. S. 507, 79 L. ed. 623), cited by the appellee, where the taxpayer had acquired in 1927 an entire issue of preferred and two classes of common stock in a holding company at a cost of \$96,000. In 1928 the holding com-

pany sold its assets for \$195,000 and thereupon retired the preferred stock for \$99,000, leaving \$96,000 in the treasury. The Commissioner allocated \$49,000 as the basis of the preferred shares and determined that the taxpayer was taxable on a gain of \$47,000. The Circuit Court of Appeals (for the Second Circuit) *held the Commissioner's allocation of cost unreasonable*, but, after quoting from Article 58, Regulations 74, identical in language to Article 22(a)-8 of Regulations 94 under the 1936 Act, *supra*, said, page 620:

“Nevertheless, while we think that the finding of the Commissioner was wrong, it does not follow that any allocation of the original consideration was ‘impracticable’.”

The decision of the Board of Tax Appeals was reversed and remanded for a determination of a proper allocation.

Likewise, in the *Appeal of Bancitaly Corporation*, 34 B.T.A. 494, where the taxpayer claimed the right to await determination of profit until all of a certain block of stock was sold, the Board, supporting the Commissioner's insistence on apportionment of cost and reporting of profit on sales of various parcels, says, page 504:

“Collectively these shares represented petitioner's investment in the consolidated bank. That this investment, or a large portion of it, was disposed of piecemeal is an inevitable conclusion upon the facts. It is well settled that where property is acquired *en block* or *en masse* and subsequently sold in lots or parcels, a computation of

gain or loss must be made upon each separate sale and the result reported in the tax return and not held in abeyance or suspense until the entire cost of the property is recovered. *Santa Maria Gas Co.*, 10 B.T.A. 1412; *Weser Bros. Inc.*, 12 B.T.A. 1394; *American Industrial Corporation*, 20 B.T.A. 188; and *O. H. Himelick*, 32 B.T.A. 792."

Again, in *Houghton v. Commissioner*, 71 F. (2d) 656, discussed in appellant's opening brief, page 26, the Commissioner had assessed a tax on the *profit* realized by the taxpayer from the sale of preferred stock received on a tax free exchange with common stock, apportioning the cost basis of the two classes of stock according to their respective values. The taxpayer contended that apportionment was impracticable and that no profit was realized until the entire cost of the original property had been recovered, relying on Article 1567 of Regulations 62, which on this point reads substantially as does Article 22(a)-8 of Regulations 94, *supra*. The Court affirmed the order of the Board of Tax Appeals approving the action of the Commissioner in making the apportionment. The same situation existed in *Salvage v. Commissioner*, 76 F. (2d) 112, 114 (affirmed: *Helvering v. Salvage*, 297 U. S. 106, 80 L. ed. 511), where the taxpayer opposed the Commissioner's action in making an apportionment between preferred and common stock to determine a profit. The Court again held such apportionment proper under the Regulations.

On the other hand, in *Curtiss v. Commissioner*, 21 B.T.A. 629, 636, affirmed 57 F. (2d) 847, 848-9, where

the taxpayer claimed a *loss* on the sale of stock acquired with other stock on a tax free exchange, the Commissioner unsuccessfully asserted that apportionment was "impracticable" and that the loss must be deferred until all the stock was sold.

As heretofore stated and as pointed out in appellant's opening brief, all of the cases involving loss claimed on the sale of components of bank and affiliate units in which the right to take such loss is denied can be reconciled with the *Hagerman* case, and that case must be considered as controlling in the decision of the present case since appellant in its proof in the Trial Court has avoided the errors which defeated recovery in the cases in which such losses were denied.

(d) Refund claim sufficiently broad to support recovery either on apportionment as of date of acquisition or as of date of termination of unitary character of stocks.

A note at the foot of page 26 of appellee's brief suggests that appellant cannot claim an apportionment as of the date of the removal of the restrictions on the separate transfer of the stock since the point was first raised on appeal and was not presented in the claim for refund. The point was raised in argument to the Trial Court. (Plaintiff's Opening Brief to the Trial Court, pages 28 and 29.) Furthermore, the market prices of the two stocks at that date were incorporated in the stipulation of facts without reservation of objection thereto. (R. 14-15.) The ground for recovery of the tax involved was stated in the refund claim, as follows:

“This taxpayer contends that it is appropriate and feasible to make a fair allocation of the cost of the Chase Bank units between the Chase National Bank stock which was sold and the Amerex Holding Corporation stock which was retained.” (R. 29.)

This is the identical ground asserted in the complaint and argued to the Trial Court and this Court. It is the ground to which appellee’s brief is devoted. The ground of recovery remaining the same, the taxpayer is entitled to present any relevant evidence in support thereof, whether or not set forth in the refund claim.

Paul Jones & Co. v. Lucas, 33 F. (2d) 907, 908;

Biermann v. Shea, 28 F. Supp. 213, 215;

F. W. Fitch Co. v. United States, 52 F. Supp. 292, 296.

CONCLUSION.

In conclusion, it is submitted that:

1. Under the prevailing and general rule gain or loss is to be recognized on the sale of property acquired with other property at a unit cost price;

2. Appellant established that the unit cost of the Chase Bank and Chase Securities stock acquired by it can be *fairly apportioned* on a basis of 75 to 25, or of 95 to 5, depending upon the date chosen for apportionment;

3. Appellee did not show here that (a) it is *impracticable* to apportion the cost of the units, or (b) that appellant’s apportionment is not fair.

The judgment below should be reversed with instructions to the Trial Court to determine a fair apportionment of the cost between the two stocks and order judgment for appellant accordingly.

Dated, San Francisco, California,
September 11, 1944.

Respectfully submitted,
WALTER SLACK,
Attorney for Appellant.

T. M. WILKINS,
Of Counsel.

No. 10757

IN THE

United States Circuit Court of Appeals¹⁴

FOR THE NINTH CIRCUIT

WM. L. GLADSTONE and H. H. HARRISON, Trustees for Psychic Spiritual Science Church, a trust estate,

Appellants,

vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for the City of Los Angeles, State of California,

Appellees.

WM. L. GLADSTONE and H. H. HARRISON, Trustees for Psychic Spiritual Science Church, a trust estate,

Complainants,

vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for the City of Los Angeles, State of California,

Defendants.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUN 21 1941

No. 10757

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WM. L. GLADSTONE and H. H. HARRISON, Trustees for Psychic Spiritual Science Church, a trust estate,

Appellants,

vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for the City of Los Angeles, State of California,

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vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for the City of Los Angeles, State of California,

Defendants.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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In the District Court of the United States
Southern District of California
Central Division

CIVIL ACTION

No. 3409 B.H.

WM. L. GLADSTONE and H. H. HARRISON, Trus-
tees for Psychic Spiritual Science Church, a trust
estate,

Complainants,

vs.

MARY GALTON and RAY L. CHESEBRO, City At-
torney for the City of Los Angeles, State of Cali-
fornia,

Defendants.

FOR PROTECTION AGAINST DESTRUCTION OF
COPYRIGHT PERSECUTION AND UNCON-
STITUTIONAL LAW, AND FOR DAMAGES
ON ACCOUNT OF IRREPARABLE INJURIES,
LOSSES AND DAMAGES CAUSED, AND AP-
PLICATION FOR TEMPORARY RESTRAIN-
ING ORDER; TEMPORARY INJUNCTION and
PERMANENT INJUNCTION.

BILL OF COMPLAINT

Comes now the complainants, Wm. L. Gladstone and
H. H. Harrison, trustees for Psychic Spiritual Science
Church, a trust estate, and complains in this bill of com-
plaint in equity, against the defendants and each of them
for a cause of action, as follows, to wit:

1.

The complainants, Wm. L. Gladstone and H. H. Harrison, are the trustees for Psychic Spiritual Science Church, a trust estate, duly organized and existing under a contract and by virtue of the constitution of the United States, acting under common law rights of contract, with headquarters located at Reno, Nevada, and a resident agent therein Louise Carll, at said headquarters 414 First National Bank Building, said City and State of Nevada.

2.

The aforesaid defendants and each of them, Ray L. Chesebro, City Attorney for the City of Los Angeles, City Hall, City of Los Angeles, State of California, and Mary Galton a Police Officer for the City of Los Angeles, City Hall, City of Los Angeles, State of California, and that said defendants have at all times herein and at all times hereinafter mentioned, have held offices in the capacity herein set forth as such officials; and fictitious named defendants, Roe Corporation, a corporation, 1 to 10; Doe Corporation, a corporation, 1 to 10; Roe and Doe Corporation, a corporation, 1 to 10; A. White and B. Black, a copartnership, doing business under the style and firm name of White and Black, 1 to 10; Jane Doe, 1 to 10; John Doe, 1 to 10; and Does, 1 to 10; the correct, true names and addresses of the said fictitious named defendants are at this time unknown to complainants, and when same are correctly known, complainants will respectfully beg leave of the court to amend this bill of complaint in equity and substitute the correct names and addresses of said fictitious named defendants and each of them.

3.

Complainants aver, that for the jurisdiction of this cause and action, that the questions involved upon which this cause and action arises, that the above entitled court is through and by federal statutes given original and exclusive jurisdiction over the matters involved in cause and action, and that complainants have suffered irreparable injuries, losses and damages by and through the use of copyright destruction in depriving complainants of their property and property rights without due process of law, causing damages to complainants in excess of Three Thousand (\$3,000.00) Dollars over and above and in excess of all costs and attorney fees in the prosecution of this cause and action in the above entitled District Court of the United States.

4.

Complainants further aver, that the aforesaid Wm. L. Gladstone, has for the past fourteen years acted as Pastor for the aforesaid Church, and that on or about March 1, 1934, that the said Church was organized by contract under the provisions of the Constitution of the United States of America, and the said Wm. L. Gladstone has at all times in the past fourteen years acted as the Pastor of said Church and is now the Pastor of said Church, which said Church is located at 3846 Wilshire Boulevard, Los Angeles, California, wherein the services and business of aforesaid Psychic Spiritual Science Church are conducted as provided under the contract by which the trustees have established the said Church, as provided under the provisions of the Constitution of the United States of America, and as provided in contract

attached hereto in copy of said contract which is marked Exhibit A for identification and made a part hereof.

5.

Complainants further aver, that during the month of June, 1943, that the aforesaid Wm. L. Gladstone, Pastor and Trustee for the aforesaid Church, and while acting as Pastor and Trustee for said Church he was arrested by the said defendant Mary Galton a woman police officer for the City of Los Angeles, State of California, she at the time being accompanied by a man presumably an officer of the said city, at this time however, complainants do not know the name and address of the said man, which will be covered by the fictitious named defendants, if necessary to name said man, and the said Mary Galton escorted the said Wm. L. Gladstone to jail where bond was furnished by Wm. L. Gladstone for appearance in Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, and on or about May 17, 1943, in case No. 18711, Municipal Court of the City of Los Angeles,, in said County and State, the said Wm. L. Gladstone through the inadvertance and inadvertant advice of counsel plead guilty to charge made against him and was fined One Hundred (\$100.00) Dollars, which the said complainant Wm. L. Gladstone paid in said case No. 18711 before the said Municipal Court.

6.

Complainants further aver, that on or about October 28, 1943, that the aforesaid defendant Mary Galton, again arrested the aforesaid Wm. L. Gladstone, and escorted him to jail, where he deposited a bond in the sum of Five Hundred (\$500.00) Dollars for appearance in case No.

21239, in aforesaid Municipal Court of the City of Los Angeles.

7.

Complainants further aver, that both of the aforesaid arrests were made by the aforesaid Mary Galton, under the provisions of Chapter 4, Article 3, Section 43.30 and charged that the said Wm. L. Gladstone had violated the said Section 43.30, the said Chapter 4, Article 3, Section 43.30 being of the Municipal Code of the City of Los Angeles, State of California.

8.

Complainants further aver, that the aforesaid Chapter 4, Article 3, Section 43.30, of the Municipal Code of the City of Los Angeles, State of California, is unconstitutional, because it is discriminating legislation contrary to the provisions of the Constitution of the United States of America, in the fact that in Section 43.31 of the aforesaid Chapter 4, Article 3, of the Municipal Code of the City of Los Angeles, in the State of California, exemptions are granted in the provisions of Section 43.30 of said Chapter and Article in said Municipal Code, wherein those exemptions are contrary to the provisions of the Constitution of the United States of America, and Federal Laws of the U. S. A.

9.

Complainants further aver, that Section 43.30 of Chapter 4, Article 3, of the Municipal Code of the aforesaid City of Los Angeles, in the State of California, reads as follows:

“Sec. 43.30—FORTUNE TELLING.

No person shall advertise by sign, circular, handbill or in any newspaper, periodical or magazine, or other publication of publications, or by any other means, to tell fortunes, to find or restore lost or stolen property, to locate oil wells, gold or silver or other ore or metal or natural product, to restore lost love or friendship or affection, to unite or procure lovers, husbands, wives, lost relatives or friends, for or without pay, by means of occult or psychic powers, faculties or forces, clairvoyance, psychology, psychometry, spirits, mediumship, seership, prophecy, astrology, palmistry, necromancy, or other craft, science, cards, talisman, charms, potions, magnetism or magnetized articles or substances, oriental mysteries or magic of any kind or nature, or numerology, or to engage in or carry on any business the advertisement of which is prohibited by this section.”

And Section 43.31 of said Chapter 4, Article 3, of said Municipal Code of the said City of Los Angeles, reads as follows :

“Sec. 43.31—FORTUNE TELLING—EXEMPTIONS.

The provisions of the preceding section shall not be construed to include prohibit or interfere with the exercise of any religious or spiritual functions of any priest, minister, rector or an accredited representative of any bonafide church or religion where such priest, minister, rector or accredited representative holds a certificate of credit commission or ordination under the ecclesiastical laws of a religious corpora-

tion incorporated under the laws of any state or territory of the United States of America or any voluntary religious association, and who fully conforms to the rites and practices prescribed by the supreme conference, convocation, convention, assembly, association or synod of the system, or faith with which they are affiliated. Provided, however, that any church or religious organization which is organized for the primary purpose of conferring certificate of commission, credit or ordination for a price and not primarily for the purpose of teaching and practicing a religious doctrine or belief, shall not be deemed to be a bonafide church or religious organization."

Complainants aver, that the said Sections 43.30 and 43.31 of the said Municipal Code of the said City of Los Angeles, operate in conjunction with each other as the same as if it was one section in the application of said Section 43.30 under which the aforesaid arrests were made of complainant Wm. L. Gladstone, by the aforesaid defendant Mary Galton as the arresting officer, therefore, on account of the extraordinary discrimination in the exemptions of said sections 43.30 and 43.31, the both said sections are unconstitutional and contrary to the provisions of the Constitution of the United States of America.

10.

Complainants further aver, that the aforesaid Sections 43.30 and 43.31 of aforesaid Municipal Code of the aforesaid City of Los Angeles were compiled and codified under the direction of aforesaid defendant Ray L. Chesebro, City Attorney for the aforesaid City of Los Angeles and

became effective November 12, 1936, and the said Ray L. Chesebro is made a defendant in this cause and action to defend said laws as their constitutionality is attacked; complainants hereof aver that the said sections 43.30 and 43.31 are unconstitutional in that the said sections exempt a priest, minister, rector or an accredited representative who holds a certificate of credit commission or ordination under the ecclesiastical laws of a religious corporation incorporated under the laws of any state or territory of the United States of America or any voluntary religious association, and who fully conforms to the rites and practices prescribed by the supreme conference, convocation, convention, assembly, association or synod of the system, or faith with which they are affiliated. Complainants aver that the said ecclesiastical laws of a religious corporation such as set forth in said sections of said Municipal Code and as provided in said Municipal Code as to who fully conforms to the rites and practices prescribed by the supreme conference, convocation, convention, assembly, association or synod of the system, or faith with which they are affiliated, is an act and law that not only exempts contrary to the Constitution of the United States, but in addition thereto, grants an exclusive monopolistic privilege in religion to a certain group or said corporation which is contrary not only to the Constitution of the United States but also is contrary to the Federal laws prohibiting such exclusive privilege in religion or anything else in the way of any kind of business, monopolistic.

11.

Complainants further aver, that the aforesaid Mary Galton, has through prejudice of her personal religious beliefs used her official position as a woman police officer to especially persecute the aforesaid Wm. L. Gladstone as Pastor and Trustee for the aforesaid Church of complainants hereof, and the said Mary Galton on account of such persecution is made a defendant herein and the said Mary Galton has caused the complainants hereof irreparable injuries, losses and damages in excess of Fifty Thousand (\$50,000.00) Dollars, in her making the aforesaid two arrests and prosecution hereinbefore mentioned, and the said defendant Mary Galton has taken from the offices of the aforesaid trust estate under which the aforesaid Church of the complainants is organized, numerous records of the trustees records, including papers, records, and a Holy Christian Bible, all of which are trustees records, and said trustees records belonging to the trustees for said Church, was in the aforesaid arrests made by said Mary Galton taken and carried away by said Mary Galton contrary to the provisions of the Constitution of the United States of America and the said Mary Galton has persecuted the said Wm. L. Gladstone under the provisions of the aforesaid unconstitutional sections of the aforesaid Municipal Code in a vindictive and prejudiced manner by making numerous arrests as aforesaid contrary to the provisions of the Constitution of the United States of America, and complainants fully believe that the said Mary Galton will continue to make further and continuous arrests under the provisions of the aforesaid unconstitutional Municipal Code, causing further irreparable injuries, losses and damages to complainants unless the

court issues a temporary restraining order restraining the defendants and each of them.

12.

Complainants further aver, that the aforesaid Mary Galton has during services in the aforesaid Church of which Wm. L. Gladstone is the Pastor and one of the trustees, the said Mary Galton used her authority to arrest a guest minister while said minister was preaching to the congregation of said Church during services in said Church, and the said arrest by the said Mary Galton was made during service in said Church of said guest minister while the said guest minister was preaching the said service, on or about during the month of June 1943, at the said Church, and the said arrest by the said Mary Galton was made for the sole purpose to destroy the said Church and the copyrights and copyrighted matter of the trustees for said Church which are used in the conducting of the religious services of said Church, and in continuous persecution of the said Mary Galton by the aforesaid numerous arrests the complainants have been caused irreparable injuries, losses and damages to the extent of Fifty Thousand (\$50,000.00) Dollars.

And further arrests and damages are threatened to complainants and damages which will far exceed the aforesaid amount of damages in the sum of Fifty Thousand (\$50,000.00) Dollars which the said Mary Galton has already caused to complainants, therefore, on account of the threatened further irreparable injuries, losses and damages, it is most necessary and vital that a temporary restraining order, temporary injunction and permanent injunction be issued by the above entitled court to prevent the occurrence of further irreparable injuries,

losses and damages which are threatened as set forth in this bill of complaint in equity.

13.

Complainants further aver, that the said complainant and trustee Wm. L. Gladstone in 1916 as the bibliographer compiled a book and work entitled, "Spiritualism and a Guide to Mediumship," and the bibliography of said book was the Holy Scriptures of the Holy Bible, and upon application by the said trustee Wm. L. Gladstone, for a copyright, the United States Copyright Office, at Washington, D. C., issued to the said Wm. L. Gladstone, a copyright on the work of said book, which said copyright is now in effect, and said book is now used as one of the text books in the work of God in the aforesaid Church of which the said Wm. L. Gladstone is the Pastor and trustee. and the said Wm. L. Gladstone as the bibliographer, has from time to time and recently written and compiled many manuscripts and work which are used as a text in the said Church, and said manuscripts and work are all founded upon the Holy Scriptures of the Holy Bible which are the bibliography of said manuscripts, and the said manuscripts and work as compiled are also protected by the Copyright Act of the United States of America, and regardless of said Copyright Act, and ignoring the said Copyright Act, the aforesaid defendant Mary Galton has continued her campaign of persecution by and through the aforesaid numerous arrests in her endeavor to not only deprive the said Wm. L. Gladstone of his liberty, but also to destroy the said Copyrights and copyrighted works contrary to the provisions of the Constitution of the United States and the Copyright Act of the United States, and in each of the aforesaid arrests made

by the said Mary Galton of the said Wm. L. Gladstone, she illegally confiscated Copyrighted work of the complainants hereof and also took from the offices of aforesaid Church trustees records in addition to the said copyrighted work, in her prejudiced campaign of persecution against the said Wm. L. Gladstone, the complainants and the said Church for the sole purpose of destruction of said copyrights and copyrighted works and the said Church and the said Mary Galton has caused to the complainants irreparable injuries, losses and damages in excess of Fifty Thousand (\$50,000.00) Dollars, and complainants are further threatened with irreparable injuries, losses and damages which makes it most necessary and vital for a temporary restraining order to be issued by the above entitled court to restrain this fraud that is being perpetrated upon complainants hereof by the said Mary Galton defendant herein.

14.

Complainants aver that the liberty of aforesaid Pastor Wm. L. Gladstone is also threatened by the aforesaid Mary Galton.

WHEREFORE, complainants pray for process and judgments as follows, to wit:

1. That a temporary restraining order issue out of the above entitled court, restraining and enjoining the aforesaid defendants and each of them, their agents, representatives, servants, employees, attorneys, officers, and all others including those in active concert or participation with said defendants and each of them, from doing anything whatsoever to impede, molest, hinder, delay or obstruct, harrass or annoy, or to conduct any procedure pertaining to the matters herein involved, wherein their

actions will operate against the complainants herein, and that said defendants and each of them be ordered and directed to appear at such time and place and show cause if any they may have, why a temporary injunction should not issue herein as provided in said temporary restraining order, during the pendency of this cause and action.

2. That upon hearing that the temporary restraining order become a temporary injunction and that a temporary injunction issue and be entered herein.

3. That upon final hearing of the above entitled matter, that the aforesaid temporary injunction become a permanent injunction, and that a permanent injunction issue and be entered herein.

4. That the defendants and each of them be ordered to return the trustees records, papers and Holy Bible which was illegally taken from the office of the said Church from the trustees offices in Los Angeles, California, by the defendant Mary Galton.

5. That the complainants be awarded and given judgment against the defendant Mary Galton in the sum of Fifty Thousand (\$50,000.00) Dollars as compensated damages for the irreparable injuries, losses and damages the said defendant has caused to complainants.

6. That the complainants be awarded and given judgment for attorneys fees including court costs and all other costs and expenses accruing in the prosecution of this cause and action, and that the court make an order accordingly.

7. That the court make an order awarding the complainants declaratory relief against the persecutions such as are set forth in the bill of complaint in equity in this cause and action.

8. That the aforesaid Sections 43.30 and 43.31 of Chapter 4, Article 3, of the Municipal Code of the City of Los Angeles, State of California, be adjudged and decreed as being unconstitutional and contrary to the Federal Laws and Constitution of the United States of America, and null and void and of no effect whatsoever, and that a judgment be rendered to such effect.

9. That the defendant Mary Galton may be ordered to return to complainants all the monies which have been imposed and fines as paid by the aforesaid Wm. L. Gladstone. Pastor and Trustee for the aforesaid Church and trust estate, under the provisions of the aforesaid Sections 43.30 and 43.31 of the Municipal Code of the aforesaid City of Los Angeles, which consists of expense, fines, costs and attorneys fees amounting to Five Hundred (\$500.00) Dollars and that complainants be awarded and given judgment for the said amount of Five Hundred (\$500.00) Dollars.

WHEREFORE, complainants pray for aforesaid persecutions, to be restrained, and for such other order, orders, aid and relief as the court may deem just and proper in the premises.

Exhibits A and B attached hereto and made a part hereof in support of bill of complaint in equity hereof.

Memorandum of Points and Authorities filed herewith and made a part hereof in support of Bill of complaint in equity hereof.

Dated: Los Angeles, California, December 18, 1943.

C. A. STICE,

C. A. Stice

Solicitor for Complainants.

[Verified.]

EXHIBIT A.

CONTRACT AND AGREEMENT TO ESTABLISH
AN ORGANIZATION UNDER THE PROVI-
SIONS OF THE CONSTITUTION OF THE
UNITED STATES OF AMERICA.

I.

The name of this organization shall be:

PSYCHIC SPIRITUAL SCIENCE CHURCH

II.

PURPOSE: Teaching and Preaching Divine Wisdom, Truth Founded upon the Word of God, as set forth in the Holy Scriptures. As follows:

(a) And further to teach privately or collectively, to individuals or groups, and publicly in classes by lectures, courses, text books, psychic and message readings, and any other method customarily used to imparting knowledge, relative to the laws of God governing spiritual and material life, existing in the image of God and in our own personal image, the recreation of life and the Spirit of God governing the welfare of humanity upon earth and in the Spirit World of God:

(b) To teach, preach and give, in the manner as above set forth, to all people or peoples in search of Divine Wisdom, and Intellectual Spiritual Knowledge and Facts concerning the Godly version of life as we have seen it in the past and will observe it in the future as provided and set forth under God's Laws in the Holy Scriptures, and to preach, teach, lecture, and to give psychic spiritual readings individually, collectively or in groups in circle or otherwise, which shall also include Psychology, Science

of Mind, Spiritual and Psychic Teachings and Psychology, Psychic Philosophy, Metaphysical and Astrological Science, Psychic Spiritual Science, as set forth in the Scriptures of the Holy Bible, or any subject of educational value which interpret the Divine Wisdom, Intelligence and Word of God, in relation to the knowledge of the Spirit of God within us, the recreation of life, and the spiritual and material existence of life within our own image.

(c) To teach and practice the art of mental healing as taught by Jesus Christ and the methods of Divine healing as used by Christian Scientists, Psychologists, Scientific Mental Healers and any other method of mental healing which may be devised and as set forth in the Scriptures of the Holy Bible.

(d) To aid all persons and organizations through the use of prayer and spiritual supplication to the Divine Wisdom, Truth and Power of God Almighty, in overcoming spiritual and mental disturbances and difficulties.

(e) To do and perform every lawful act and thing necessary to carry out the foregoing provisions and purposes wherever this foregoing named Holy Church may find its activities under the provisions of the Constitution of the United States of America, in carrying on its work in the Word of God and His Work as set forth in the Scriptures of the Holy Christian Bible.

III.

OFFICERS

The officers of this organization shall be:

(a) A Pastor, who shall be president and a trustee thereof as provided herein within this contract:

(b) A Secretary, who shall keep the records of the trustees of all proceedings of this organization and perform such other duties which are generally performed by the secretary of any organization, and the secretary shall collect and disburse all funds in the maintenance of this Church and the secretary shall in lieu of a treasurer may choose and select a bank as the depository for the funds belonging to this Church, and the Secretary shall also be a trustee for this organization.

(c) All officers and trustees shall be elected by a majority vote of the trustees, and the trustees may be three in number, more or less, and shall hold office by a majority vote of the trustees, and other trustees may be added and provided in case of death, resignation, malfeasance in office or obvious tort, and the trustees shall hold title to all property in this trust estate of this Church hereof, and the trustees may enter into and conduct any and all kinds of business necessary and incident hereto and may do any and all things which are necessary in the conduct of the affairs and business of this contract under which this trust estate for the Church hereof is established and the foregoing name of this organization is the business name of the trustees which is Psychic Spiritual Science Church, and the business of this contract under which this Church is established shall be conducted under the provisions of the Constitution of the United States of America and as herein provided.

IV.

MEMBERSHIP OF THIS CHURCH.

Any person of good moral character and standing in the community is eligible to membership of the Church hereof, and all applications for membership shall be submitted orally or in writing or both at a regular meeting of the Church schedule of meetings and submitted to the trustees for approval or rejection by the trustees, and a majority vote of the trustees present shall determine the disposition of the applicant's application for membership in the Church hereof. All members of the Church hereof, shall contribute within their discretion, to the financial obligations of the Church as God has prospered each of the members hereof, and as the Spirit of God within them prompts them to do in the support of the Church on doing the Work of God Almighty as herein provided under the provisions of the Constitution of the United States of America. No member is authorized to incur any obligation against this estate under which this Church is organized as herein provided. Members may hold meetings of approbation or protest, but said meetings of members shall in no manner effect the rights of the trustees in the management of the affairs of the estate of the Church hereof or in holding title to the property of this estate, and all members are subject to the terms and conditions as set forth and provided in this contract under which the estate of the Church hereof is established by the trustees for this estate in trust as herein provided.

V.

This conveyance, acceptance and contract under which this Church is established, made and entered into in triplicate on the day and date below written by and between Wm. L. Gladstone and H. H. Harrison, each of whom are hereby designated the trustees for this estate in trust and joint tenancy holders, who with associate or successor trustees, may by virtue hereof act collectively under the business name and of the trustees herein designated which is hereby adopted.

That for and in consideration of One (\$1.00) Dollar, lawful United States money and other valuable considerations, receipt of which is hereby acknowledged by Wm. L. Gladstone, herein designated as the Conveyer and to be known herein as the Conveyer, and in consideration of the objects and purposes herein set forth and provided, the said conveyer does hereby sell, assign, convey, transfer and deliver to the aforesaid named persons herein designated as trustees for this trust estate which is established by this contract, the property sold, assigned, conveyed, transferred and delivered to said trustees for this estate in trust to constitute the initial trust estate herein, is described as follows: Certain manuscripts written by the said conveyer and One (\$1.00) Dollar lawful United States money. The property described herein is hereby accepted by the trustees, and the trustees may name their successors and perform a dissolution at any time for good and sufficient reasons.

VI.

The General Headquarters of this trust estate are located at Reno, Nevada, at address as follows: 414 First National Bank Bldg. And Louise Carll is the resident agent at said address. Branch offices may be established elsewhere.

VII.

Filing and recording this contract in the County Recorder's Office in the County and State wherein the general headquarters of the trustees are located as specified herein, shall be notice to the entire world that all obligations and debts of this trust estate must look to the funds and assets of this estate for payment of same, and trustees, officers, agents, representatives and members or others interested in this estate shall not be personally held in any manner for the payment of said obligations and debts beyond the assets and funds of this trust estate in extent and value.

The beneficiaries of this trust estate are as set forth in the trustees records.

It is unanimously voted and resolved, that the Officers of the Board of Trustees, are hereby designated as follows, to wit:

WM. L. GLADSTONE, President. H. H. HARRISON, Secretary.

We, the Conveyor and Trustees hereby mutually subscribe ourselves the day and year below written, in confirmation, acceptance and adoption of the terms and conditions herein set forth and provided under the pro-

visions of God's Laws and the Constitution of the United States of America.

WM. L. GLADSTONE

Signature of Wm. L. Gladstone,
Conveyor.

WM. L. GLADSTONE

Signature of Wm. L. Gladstone,
Trustee.

H. H. HARRISON

Signature of H. H. Harrison,
Trustee.

The said trustees in their collective capacity as a Board of Trustees have hereunto subscribed confirmation in their *respective*

EXHIBIT B

ASSIGNMENT

I, the undersigned, Wm. A. Gladstone, Pastor and Trustee for the trust estate of Psychic Spiritual Science Church, do hereby assign all my right, title and interest in and to any and all copyrights which I may own or any interest I may have in same to the trustees for said Psychic Spiritual Science Church, and I also do hereby assign all my rights, title and interest in and to any damages, equities or monies which I may be entitled to from any source whatsoever through and by any law suit for damages, and said assignments are hereby made to the trustees for Psychic Spiritual Science Church, in consideration of One (\$1.00) Dollar and other valuable considerations, receipt of which is hereby acknowledged, and any property of said assignments is to be held in trust by the

trustees as provided under the contract by which the said trust estate is established.

WM. L. GLADSTONE,
Wm. L. Gladstone,
Pastor and Trustee, for
Psychic Spiritual
Science Church.

ACKNOWLEDGEMENT

This Is To Certify, that Wm. L. Gladstone, personally known to me, appeared in person before me, a Notary Public, in and for the County of Los Angeles, State of California, and acknowledged to me that he signed and executed the foregoing instrument of his own voluntary sane act and deed for the uses and purposes therein set forth and provided on the 26th day of December, 1943.

(Notary Seal)

EDNA M. TILTON,
Notary Public.

My Commission Expires on the 22d day of July, 1944.

The above assignment is hereby accepted by the Trustees for Psychic Spiritual Science Church, on the date of above acknowledgment.

Wm. L. Gladstone,
Signature of Wm. L. Gladstone, Trustee.

H. H. Harrison,
Signature of H. H. Harrison, Trustee.

TRUSTEES FOR PSYCHIC SPIRITUAL
SCIENCE CHURCH.

[Endorsed]: Filed Jan. 18, 1944.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT
FOR INJUNCTION AND FOR INJURIES
CAUSED BY DESTRUCTION OF COPY-
RIGHT.

To the above named complainants, and to C. A. Stice,
their attorney:

Notice Is Hereby Given, that in the courtroom of the
Honorable Ben Harrison, Judge of the above entitled
court, on the 31st day of January, 1944, at the hour of
10 o'clock A. M., or as soon thereafter as the convenience
of the Court will permit, the above named defendants
will move the Court to dismiss the complaint filed in the
above entitled action, on the grounds and for the reasons
that:

I.

Said complaint does not state facts sufficient to show
that this Court has jurisdiction of the cause of action
therein attempted to be stated.

II.

Said complaint fails to state facts sufficient to con-
stitute a cause of action against the above named defend-
ants, or against either of them.

Said motion will be based upon the files and papers
in said action.

DONALD M. REDWINE,
Assistant City Attorney,
WIXON STEVENS,
Deputy City Attorney,

John L. Bland
JOHN L. BLAND,
Deputy City Attorney,
Attorneys for Defendant RAY L. CHESEBRO.

RAY L. CHESEBRO,
City Attorney,
DONALD M. REDWINE,
Assistant City Attorney,
WIXON STEVENS,
Deputy City Attorney,
John L. Bland,
JOHN L. BLAND,
Deputy City Attorney,
Attorneys for Defendant MARY GALTON.

ORDER SHORTENING TIME.

Good Cause Appearing Therefor, it is hereby ordered that time for service of the above Notice of Motion be, and it is hereby shortened, and that said Notice may be made upon the attorney for complainants at any time prior to 5 o'clock P.M., January 25, 1944.

Dated this 25th day of January, 1944.

PAUL J. McCORMICK,
Judge.

[Endorsed]: Filed Jan. 25, 1944.

[Title of District Court and Cause.]

AFFIDAVIT OF MARY GALTON IN OPPOSITION
TO ISSUANCE OF PRELIMINARY INJUNC-
TION.

State of California,
County of Los Angeles—ss.

Mary Galton, being first duly sworn, deposes and says:

That she is a policewoman and as such is a regularly commissioned mmeber of the Police Department of the City of Los Angeles;

That on April 29, 1943, in the performance of her assigned duty of investigating persons believed to be telling fortunes in violation of the provisions of the Los Angeles Municipal Code, she visited the premises located at and known as 3846 Wilshire Boulevard, at about the hour of 2:30 P.M. That upon entering the premises at said address she was greeted by Wm. L. Gladstone, who ushered her into his office, and in reply to a question by the affiant, stated: "I have two, three and five dollar readings;" whereupon affiant asked: "What is the difference?" In reply thereto the said Gladstone stated: "They are semi-trance, dead trance and astoral dead trance; you get out of it what you put into it. Whichever you decide, lay the money on the Bible, as I am a trance reader."

That affiant thereupon placed \$3.00 on a very worn, dirty and old Bible, at which time the said Gladstone reached across the desk and took hold of affiant's hand and held them tightly for the remainder of the reading. That while so holding the hands of affiant the said Gladstone said: "I got a bright light around you. I see a man who has been in the Spirit World a long time.

He is tall, broad shoulders, is protecting and watching out for you. There are many spirits in the Spirit World who are interested in you. I see a man with gray hair. I see for you a lovely home, and I see you walking up to it and your husband opening the door to greet you. You will have success in 1943, '44, '45, '46, '47, '48, '49 and '50. I see a change for you. In 1950 you will have an illness, and you must be sure to get a good physician. I see you having an automobile accident in crossing the street; there is glass all around you. You must be very careful. If you are careful and survive the accident and the illness you will live to be 80 and past."

That after the said Gladstone told the affiant that she might ask some questions, she asked the question: "Is my husband alive?" In reply thereto the said Gladstone stated: "I don't get him among those who have gone on." Thereupon affiant asked: "Is he alive then?" and the said Gladstone answered: "If he isn't dead he must be alive." Thereupon affiant asked: "How will the lawsuit over my mother's will come out?" to which question the said Gladstone answered: "Keep up the lawsuit and fight it out and I see you coming out successfully." The affiant then asked of the said Gladstone: "What about the other man who is interested in me?" to which the said Gladstone replied: "He is very sincere and honest and loves you very much and is a very fine man. What is his occupation?" and affiant answered: "He is an Executive at Lockheed." Thereupon the said Gladstone said: "Yes, I see he will be very successful and you will be very successful too. I see a change for you that will bring you much success; stick to this man." Thereupon affiant stated: "But I am married," and Gladstone replied:

“Yes, I know it, but you know many, many of the boys are lost in the jungles and are prisoners of war and are being killed off and starved, not only by the Japanese but by the Germans—this is not Hitler’s war, this is the Kaiser’s war, his generals and majors are the ones that are causing the trouble.”

Affiant then asked: “When will the war end?” and the said Gladstone answered: “I don’t know but I see that very soon a white flag will be run up,” and affiant asked: “Who will put it up?” and Gladstone answered: “The whole world will. This is the flag of Peace. You know we don’t have enough planes to fight; really we have enough planes but I have it from high authority that there are not enough men to fly the planes.”

The said Gladstone further stated: “For \$5.00 a week I will pray for you at 8:00 in the morning, at noon, and at 8 o’clock at night, and work out your problems for you spiritually. I do it for many others, and for that I will also give you the lesson sheets which you will read.”

Thereafter, on April 30, 1943, at the hour of 7:10 P.M. affiant, after having read a newspaper advertisement and an advertisement in front of the premises located at 3846 Wilshire Boulevard, in the City of Los Angeles, again entered the premises at 3846 Wilshire Boulevard to attend a “Message Circle.” Upon entering the premises the affiant observed approximately six people in attendance, seated in a room containing 29 folding chairs. Also in the room was a middle aged woman of medium build, with gray hair, who spoke in an illiterate manner, and who was giving readings to each person, one at a time. The affiant remained in the room until 8:30 P.M., during which time approximately nine additional people entered.

The woman above mentioned who was giving the readings (hereafter spoken of as the "reader") told one woman that she, the reader, saw illness around her and someone in a wheel chair. The woman to whom the reading was being given said her husband was ill and she was worried about his recovery. The reader replied: "I told you I saw someone in a wheel chair." The woman then replied: "But my husband hasn't been out of bed for six months. Will he live?" The reader said: "No, I have bad news for you. He will never get up from his bed and he will die soon."

The reader told another woman that she, the reader, could feel for her a pain in her stomach. The woman said: "No, not in my stomach, but sometimes in my back." The reader then said: "The pain went from the stomach to the back," and that she could see the stove over there (pointing to the north) and on that stove she should heat some goose grease and turpentine together and rub on her back.

The reader told a man who was then and there present that he was going to change his occupation and work much harder, and that the clock was up there (pointing) and that he should be careful not to forget to wind the clock. The man replied that he never wound the clock as it was an electric clock. The reader then stated that something would be wrong with the clock and it was impossible to get clocks now, so he would have a clock there that would have to be wound. The reader further stated that she got a message from the Spirit to tell everyone that they should buy up a supply of soap—both toilet and laundry—and of matches, because they soon would not be able to buy any.

The reader told another woman that she, the reader, saw a washing machine over there (pointing) and there was something wrong with the washing machine; something wrong in the gears. The woman replied that she didn't have a washing machine and didn't know of anyone who had anything wrong with her's.

The reader then turned to affiant and said: "I get the name 'Rosie,'" to which the affiant answered: "I don't know any Rosie." The reader then said: "You have just had a great disappointment," to which affiant answered: "I can't think of any." The reader then said: "Yes, you have had many disappointments in your life," and continuing the reader said: "Little girl, you are going to have to learn to wash dishes, but it will not be for money; in fact, I see you washing lots of dishes, large sinks full. It may even be for the Army or Navy. I get the name Josephine, or Jo," to which the affiant replied that she didn't know any Jo, whereupon the reader said: "Yes you do, you have to use your head." The reader then asked the affiant to ask a question, and affiant asked: "Will I take a position?" to which the reader replied: "Yes, I see you doing a great deal of work; working hard and long." Affiant asked: "Where?" "And doing what?" to which the reader replied: "You will work for the Government. I see a dresser over there (pointing to the north) and I see you dressing for work in front of it. I get the name 'Al.'" The affiant stated that she didn't know any Al, but the reader insisted and finally the affiant stated that one of her in-laws was named Al, and the reader stated: "Of course, that is the same as your own relative, and he is the one who is telling me about your going to work."

When the affiant entered the said premises on the evening of April 30, 1943, she was stopped at the door by Wm. L. Gladstone who blocked the door and held out his hand, saying: "Donation please." The affiant asked "How much?" and Gladstone replied: "Fifty cents," at which time affiant gave Gladstone fifty cents before she entered. There was also a sign inside the room where the readings were given which read: "Donations 50¢."

That thereafter, on May 7, 1943, the affiant, together with another police officer, on or about the hour of 8:15 P.M., again entered the premises at the address above named and were greeted at the door by Gladstone, who held out his hand and said: "Donation please." The officers then gave Gladstone a dollar and entered the room heretofore referred to, and in which were seated ten people. The woman heretofore described and referred to, was again giving readings. The reader stated to a young man that he ate too fast and that it was going to make him sick, but that he could avoid that by eating more slowly and chewing his food more. She, the reader, said: "I see the beach; I see a ferris wheel; somebody likes to ride on the ferris wheel."

The reader said to a woman who was then present: "You are going to be married shortly, and be involved in two legal suits shortly." The woman asked the reader if she were going to get a divorce, and the reader said "Yes," and told the woman that she would not have any trouble getting it but that she would be back in court within six months. The reader told her that she wouldn't get anything out of the divorce and that she would have to work for anything she got.

The reader told another woman then present that she came from a fine family and that everything was very fine around her, but that she saw a man hanging right there in the room; it was the Spirit of someone who had hanged himself. The woman said that she didn't know of anyone, and the reader stated that she could see him there so plainly that if she had a camera she could snap his picture. The reader told another woman that she got the name "Mary," to which the woman replied that she knew many Marys, in fact everyone knew a Mary, at which time the reader said: "Ouch, don't do that," and at this time winced as though someone had struck her, and said: "Lady, you shocked the spirits."

The reader then turned to the side as though she were listening to spirits, and said: "Oh, you want me to tell all of them?"—"Yes, I'll tell them." Then the reader turned to the assembly and said: "The spirits tell me to tell you all to stock up on soap of all kinds, and matches, because they will not be made shortly."

The reader also told one woman the exact item regarding a washing machine as affiant had heard her tell on the previous Friday, and told another woman she saw the stove and saw this woman getting burned on the stove. She told another woman that she saw someone who had been bitten by a dog, and the woman said that she could not remember anyone. The reader insisted and the woman finally stated that many years previously her brother had received a slight wound from a dog bite on the ankle. The reader then stated that he must be very careful as he was going to have trouble with that old wound.

Affiant further states that on May 14, 1943, she, together with another police officer, entered the above named

premises at a time when the woman above described was giving a reading, and affiant and the other police officer sat down. Shortly thereafter the said Gladstone came in and interrupted the reader by saying: "Mrs. Johnson, I just wanted you to know that these are the people that took me away this afternoon." Mrs. Johnson, the reader, then made the following statement:

That she organized her own church which was the First Church of Divine, which was named after a friend named Grace Divine, now deceased; that she got the charter from Sacramento; that it was a Spiritualist Church but that she had been a Lutheran from birth. Throughout the conversation, many times, without provocation, she would exclaim: "Bless you darling heart." She stated that her husband and all her children were Catholic and in her purse were two Catholic scapula medals. She stated the live ones are the dead ones and the dead ones are really the live ones. She stated that she had worked for Gladstone for years, on a 50-50 basis; that Gladstone did the advertising in his name but that she did the work. She said to affiant: "You are psychic, you get hunches," and affiant replied: "Oh, yes, everyone does," and Mrs. Johnson answered: "I know it." She stated that she did not know any of the people who came to the circle meetings because the same people never came twice.

MARY GALTON.

Subscribed and sworn to before me this 25th day of January, 1944.

Paul Palmer (Seal)

Notary Public in and for said County and State.

My Commission expires Sept. 27, 1944.

[Endorsed]: Filed Jan. 25, 1944.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR PROTECTION
AGAINST DESTRUCTION OF COPYRIGHT,
PERSECUTION AND UNCONSTITUTIONAL
LAW, AND FOR DAMAGES ON ACCOUNT
OF IRREPARABLE INJURIES, LOSSES AND
DAMAGES CAUSED, AND APPLICATION
FOR TEMPORARY RESTRAINING ORDER;
TEMPORARY INJUNCTION AND PERMA-
NENT INJUNCTION.

Comes now Ray L. Chesebro as City Attorney of the City of Los Angeles, and Mary Galton as a police officer of the City of Los Angeles, defendants in the above entitled action, each appearing for himself alone and for no other, and in answer to the complaint filed in such action admits, denies and alleges as follows:

I.

Defendants deny generally and specifically each and every allegation contained in Paragraph 1 of Complainants' complaint in the above entitled action.

II.

Defendants deny generally and specifically each and every allegation contained in Paragraph III of said complaint, and specifically deny that the Complainants or either of them have been damaged in a sum in excess of \$3,000.00 or in any other sum whatsoever by or on account of any acts committed by these Defendants or either of them.

III.

Defendants deny generally and specifically each and every allegation contained in Paragraph IV of said complaint.

IV.

In answer to Paragraph V of said complaint, Defendants deny that the Complainant Wm. L. Gladstone was, in June 1943 arrested by Defendant Galton, and in this connection allege that after an investigation extending over a period of 30 days which investigation disclosed that the said Gladstone was engaged in the business of telling fortunes, the Defendant Galton arrested the said Complainant on or about May 14, 1943 for having violated the provisions of Section 43.30 of the Los Angeles Municipal Code and that thereafter a complaint was regularly filed in the Municipal Court charging the said Complainant with having violated said section of the Municipal Code of the City of Los Angeles, and that the said Gladstone thereafter, after being advised by counsel, pleaded guilty thereto.

Defendants deny that the plea of guilty of the offense charged in said complaint was entered through inadvertence of the said Gladstone and of his attorney.

V.

Defendants admit the allegations contained in Paragraph VI of said complaint and in this connection allege that after the arrest of defendant as set out in said Paragraph, a criminal complaint was filed against the said Wm. L. Gladstone charging him with having violated the provisions of Section 43.30 of the Los Angeles Municipal Code, and that thereafter the said Gladstone entered a plea of guilty to said charge.

VI.

Defendants deny generally and specifically each and every allegation contained in Paragraph VIII of said complaint.

VII.

Defendants admit that the provisions of Section 43.30 and 43.31 as set out in Paragraph IX of the said complaint constitute a true and correct copy of the above numbered section of the Los Angeles Municipal Code and deny generally and specifically each and every allegation contained in said Paragraph IX not herein in this Paragraph of their answer specifically admitted.

VIII.

In answer to Paragraph X of said complaint Defendants deny that said Sections 43.30 and 43.31 or either of them are unconstitutional for the reasons stated therein or for any other reason whatsoever.

IX.

Defendants in answer to Paragraph XI of said complaint allege that at the time of the arrest of Complainant Gladstone on May 14, 1943 Defendant Galton took for use as evidence the following articles:

- 1 bundle of lesson sheets
- 1 sign reading "Donation to Church 50¢"
- 1 certificate, Church of Religious Science
- 1 certificate, Church of Divine Light
- 1 certificate, Golden State University (D D)

1 Bible, which was used by the said Gladstone as a receptacle for money paid by persons having their fortunes told and that at the time of the arrest of the said Gladstone on October 28, 1943 such Defendant took for use as evidence certain books and papers including one Bible and also two Five (\$5.00) Dollar bills and a One (\$1.00) Dollar bill. All of the articles taken at the time of the aforesaid arrests were seized for use as evidence and for no other purpose and have been returned to the said Gladstone prior to the institution of this action. Defendants deny that the Defendant Galton has through prejudice of her religious beliefs used her official position to in any manner persecute the said Wm. L. Gladstone; deny that the said Mary Galton has in any manner whatever caused the Complainants to suffer injuries, losses or damages in the sum of Fifty Thousand (\$50,000.00) Dollars or in any other sum whatever; deny that the said Defendant has taken from the offices of the trust estate or elsewhere any papers, records or other property other than that hereinbefore in this Paragraph of Defendants' answer specifically named, all of which Defendant believes to be and alleges to be the property of the said Wm. L. Gladstone.

Defendants deny generally and specifically each and every allegation contained in said Paragraph XI not hereinbefore specifically admitted or denied.

X.

In answer to Paragraph XII of said complaint Defendants deny that the Defendant Galton ever at any time or

at all arrested a guest minister of the Psychic Spiritual Church while such minister was preaching to a congregation of said church or while said minister was preaching the service in said church, and deny that said defendant arrested such guest minister or any other person for the purpose of destroying said church and the copyrights and the copyrighted matter of the trustees of said church or for any of said purposes and further deny that by reason of the persecutions of the said Defendant Galton by continuous arrests or by any other means whatsoever the said Complainants have been caused injuries, losses or damages in the sum of Fifty Thousand (\$50,000.00) Dollars, or in any other sum whatever, and in this connection the Defendants allege that on or about the 14th day of May, 1943, the Defendant visited the premises located at and known as 3846 Wilshire Boulevard in the City of Los Angeles and there found one Mrs. Johnson engaged in the act of telling fortunes in violation of the provisions of the Ordinance of the City of Los Angeles, and that the said act of the said Mrs. Johnson constituted a misdemeanor committed in the presence of the Defendant Galton whereupon said Defendant arrested the said Mrs. Johnson and caused her to be charged in the Municipal Court of the City of Los Angeles with the commission of a misdemeanor.

Defendants further allege that the said arrest above named was made in the regular performance of the duties of such Defendant as a police officer of said City. De-

Defendants further allege that any and all articles taken by the said Defendant Galton were taken for use as evidence against the said Mrs. Johnson and for no other purpose.

Defendants further deny that threatened arrests of said Complainants will cause injury, damage or loss to the Complainants other than such loss or injury as is the natural and usual damage suffered by persons who violate the Penal laws of the State and are prosecuted therefor.

XI.

In answer to Paragraph XIII of said complaint Defendants allege that they are without information or belief sufficient to enable them to admit or deny the allegations that the Complainant Wm. L. Gladstone has compiled certain books and papers and that the same have been copyrighted and that said books and papers are used as texts in the Psychic Spiritual Science Church and upon such lack of information and belief Defendants deny each and every allegation above referred to as being set out in said Paragraph XIII.

Defendants further deny that the Defendant Galton has continued a campaign of persecution by and through numerous arrests of the Complainant Wm. L. Gladstone, or otherwise in an endeavor to deprive the Complainant Wm. L. Gladstone of his liberty or to destroy any copyrights or copyrighted works whatsoever, and said Defendants further deny that the said Defendant Galton illegally confiscated copyrighted works of the Complainants or of either of them for the purpose of destruction

of said copyrights or copyrighted works or of said church or for any other purpose whatever and in this connection allege that all seizures of books and papers made by the Defendant Galton were lawfully made for the sole and only purpose of using such books and papers in the criminal prosecution of the said Wm. L. Gladstone and the Mrs. Johnson heretofore named in this answer.

Defendants further deny that the Defendant Galton has caused in any manner injuries, losses or damages to the Complainants in this action or to either of them in the sum of Fifty Thousand (\$50,000.00) Dollars, or in any other sum whatever and further deny that the Complainants are threatened with any future injury, loss or damage because of any threatened or contemplated action of these Defendants or either of them.

XII.

In answer to Paragraph XIV of said complaint Defendants deny that the liberty of the Complainant Wm. L. Gladstone is threatened by the Defendant Galton except to the extent that the lawful enforcement of the Ordinances of the City of Los Angeles and of the Statutes of the State of California may result in curtailment of his liberty.

Wherefore, Defendants pray that this Honorable Court make and enter its order and judgment denying the Complainants Wm. L. Gladstone and H. H. Harrison an *injunction* against these Defendants or either of them; denying the Complainants any relief whatever under their complaint, giving these Defendants judgment for their costs

and for such other and further relief as may be just and proper in the premises.

Respectfully submitted,

RAY L. CHESEBRO,

City Attorney,

DONALD M. REDWINE,

Assistant City Attorney,

WIXON STEVENS,

Deputy City Attorney,

John L. Bland,

JOHN L. BLAND,

Deputy City Attorney,

Attorneys for Defendant Mary Galton.

DONALD M. REDWINE,

Assistant City Attorney,

WIXON STEVENS,

Deputy City Attorney,

John L. Bland,

JOHN L. BLAND,

Deputy City Attorney,

Attorneys for Defendant Ray L. Chesebro, City
Attorney for the City of Los Angeles, State of
California.

[Verified.]

[Endorsed]: Filed Jan. 25, 1944.

[Title of District Court and Cause.]

OBJECTION TO MOTION TO DISMISS AS MADE
BY DEFENDANTS, UPON GROUNDS THE
ABOVE NAMED COURT HAS JURISDICTION.

Comes now the complainants and objects to the motion to dismiss as made by the defendants and each of them, upon grounds that the above entitled court has jurisdiction, which said grounds are as follows:

1. A federal question and violation of a federal statute is involved in the above entitled cause and action, over which the above entitled court has original and exclusive jurisdiction, which said federal statute has been violated by the defendants against lawful rights granted to complainants.

2. Where a federal question and federal statute are involved it is not necessary to show diversity of citizenship by complainants.

Dated: Los Angeles, California, January 18, 1944.

Respectfully submitted,

C. A. Stice,

C. A. STICE,

Solicitor for Complainants.

Memorandum Of Points And Authorities Filed Herewith, Made a Part Hereof.

[Endorsed]: Filed Feb. 14, 1944.

[Title of District Court and Cause.]

MOTION TO STRIKE AFFIDAVIT OF MARY
GALTON FROM FILES OF THIS ACTION
AND RECORD.

Complainants file this motion to strike the affidavit of defendant Mary Galton from the record and files of this action, on submission to the court with other pleadings filed herewith on submission as to jurisdiction, and objection to motion to dismiss by defendants, this motion is submitted upon the ground, that the innocence or guilt of complainant Gladstone is not a matter before the court, as the only questions before the court, is jurisdiction and the alleged unconstitutional ordinance, Sec's. of the Municipal Code of Los Angeles, the said affidavit is immaterial and unnecessary and has no bearing on the matters involved, as paper is scarce account of war and if an appeal is taken it uses paper in a wasteful and expensive manner, in printing etc.

Wherefore, complainants pray said affidavit be stricken from the record.

Respectfully submitted,

C. A. Stice,

C. A. STICE,

Solicitor for Complainants.

All Papers Filed In This Action In Support Of This Motion And Made a Part Hereof.

[Endorsed]: Filed Feb. 14, 1944.

At a stated term, to-wit, The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 25th day of February in the year of our Lord one thousand nine hundred and forty-four.

Present:

The Honorable: Ben Harrison, District Judge.

No. 3409-BH Civil:

WM. L. GLADSTONE, et al., etc.,

Plaintiffs,

vs.

MARY GALTON and RAY L. CHESEBRO, etc.,

Defendants.

The motion to dismiss heretofore submitted on briefs is granted on the grounds that the complaint does not state facts sufficient to constitute a cause of action. The Court considers the ordinance valid and a proper exercise of the police powers. It is ordered that Order to Show Cause on the calendar of February 28, 1944, be stricken therefrom.

In the United States District Court Southern District
of California Central Division.

WM. L. GLADSTONE and H. H. HARRISON, Trus-
tees for Psychic Spiritual Science Church, a trust estate,
Plaintiffs,

vs.

MARY GALTON and RAY L. CHESEBRO, City At-
torney for the City of Los Angeles, State of California,
Defendants.

No. 3409-BH-Civil

JUDGMENT OF DISMISSAL.

On January 28, 1944, this cause came before the court on stipulation, and C. A. Stice, Esq., appeared for the Plaintiffs and Ray L. Chesebro, City Attorney, by John L. Bland, Esq., Deputy City Attorney of the City of Los Angeles, California, appeared for the defendants and on motion and by consent of said counsel, the court ordered the Motion of defendants to Dismiss submitted upon the filing of briefs; and the hearing on the Order to Show Cause upon the Complaint was continued to February 28, 1944 at 10 A.M.; and the briefs of both counsel having been filed herein, and the court having duly considered the pleadings, said Motion to Dismiss, and the law applicable, and on this 25th day of February, 1944, a minute order was entered granting said Motion to Dismiss on the

grounds that the Complaint does not state facts sufficient to constitute a cause of action, and ordered the said Order to Show Cause stricken from the calendar for hearing;

It Is, Therefore, Ordered, Adjudged and Decreed that this cause be, and it is hereby dismissed.

Dated: Los Angeles, California, February 28, 1944.

BEN HARRISON,
U. S. District Judge.

Judgment entered Feb. 28, 1944. Docketed Feb. 28, 1944. Book C. O. #23, Page 732. Edmund L. Smith, Clerk; by Murray E. Wire, Deputy.

[Endorsed]: Filed Feb. 28, 1944.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES CIR-
CUIT COURT OF APPEALS, NINTH CIRCUIT.

Notice is hereby given: That the complainants, Wm. L. Gladstone and H. H. Harrison, Trustees for Psychic Spiritual Science Church, do hereby give Notice that they appeal from the judgment rendered by the District Court of the United States, Southern District of California, Central Division, to the United States Circuit Court of Appeals, Ninth Circuit, Los Angeles, California, and this appeal is taken from the judgment of dismissal and the whole thereof, which said judgment was entered in the above entitled cause and action on the 28th day of February, 1944.

Dated: Los Angeles, California, March 10, 1944.

C. A. Stice,
C. A. STICE,
Solicitor for Complainants.

Mailed copy to Ray L. Chesebro, Donald M. Redwine,
John L. Bland, Wixon Stevens, Defts' Attys.

[Endorsed]: Filed Mar. 28, 1944.

[Title of District Court and Cause.]

COST BOND ON APPEAL.

Know All Men By These Presents:

Whereas on the 25th day of February, 1944, the above entitled Court made an order dismissing the bill of complaint in equity as filed by complainants, and such order and judgment was entered as a judgment of dismissal on the 28th day of February, 1944, in favor of the defendants and each of them in the above entitled cause and action and against the complainants, in above action.

And the complainants having appealed the said judgment to the Circuit Court of Appeals, of the United States, Ninth Circuit, from said judgment.

Therefore, the complainants hereof, file a bond in the sum of Two Hundred Fifty (\$250.00) Dollars, for the payment of any and all costs for which judgment may be rendered by the Court on this Appeal to the Circuit Court of Appeals of the United States, Ninth Circuit.

Now, Therefore, in consideration of the premises and aforesaid judgment for costs of any kind being rendered by the aforesaid Circuit Court of Appeals of the United States, Ninth Circuit, we, the undersigned, residents of the County of Los Angeles, State of California, do hereby jointly and severally undertake, guarantee and promise on the part of the complainants, Wm. L. Gladstone and H. H. Harrison, Trustees for the Psychic Spiritual Science Church, a trust estate, will pay any and all judgments for costs which may be awarded against the said complainants in the above entitled cause and action on appeal to the Circuit Court of Appeals of the United States, Ninth Circuit, not exceeding Two Hundred Fifty (\$250.00) Dollars,

to which said amount we acknowledge ourselves jointly and severally bound.

Viola Piedlow, Surety,
Mrs. Ruth E. Ernst, Surety.

United States of America
State of California

County of Los Angeles—ss.

Viola Piedlow and Mrs. Ruth E. Ernst, whose names are subscribed as sureties to above bond, being duly sworn, each individually deposes and says: That each individual subscriber to the above bond, is a freeholder in said district and is worth the sum of Two Hundred Fifty (\$250.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Viola Piedlow, Surety.
Mrs. Ruth E. Ernst, Surety.

Address of Surety:

Viola Piedlow, 5037 So. Normandie, L. A.

Address of Surety:

Mrs. Ruth E. Ernst, 454 W. 41st Pl., L. A. 37.

Subscribed and sworn to before me this 17 day of March, 1944.

Orissa D. Poole,
Notary Public, in and for the County of Los
Angeles, State of California.

(Notarial Seal)

My Commission expires Mar. 15, 1945.

I Hereby Certify, that I believe the foregoing named sureties to the foregoing bond to be qualified to act as sureties on the said bond.

C. A. Stice,
C. A. STICE,
Solicitor for Complainants.

The foregoing bond is hereby Approved:

-----,
Judge of the Above Entitled District Court.

[Endorsed]: Filed Mar. 28, 1944.

[Title of District Court and Cause.]

STATEMENT OF POINTS.

Statement of Points.

Wm. L. Gladstone and H. H. Harrison, Trustees for Psychic Spiritual Science Church, a trust estate, Appellants in the entitled cause and action, herewith present points as follows:

Point 1.

That the Federal Court has jurisdiction of the above entitled cause and action in the District Court of the United States, on the ground a copyright is involved in said cause and action as set forth in the bill of complaint in equity, as under a federal statute and the Copyright Act, the said District Court of the United States have original and exclusive jurisdiction over matters wherein the Copyright Act is involved, such as is set forth in the bill of complaint of the above entitled cause and action, as the destruction of the aforesaid Psychic Spiritual Science

Church in the manner and method as averred in the bill of complaint in equity, also destroys the aforesaid copyrighted book and works which are used by the members and ministers of said Church, at the same time when the attack is made on the said Church for the purpose of destruction, as set forth in the bill of complaint in equity, and the District Court below rendered no ruling on the rights of complainants under the Copyright Act of the United States and likewise no ruling by said District Court relative to federal statutes regulating the matters of copyrights, other than a judgment of dismissal, as in the minute order of the District Court below, there is no mention of claims of complainants relative to the Copyright Act under which complainants have copyrights which complainants aver in their bill of complaint in equity, have been interfered with by the defendants by making arrests as set forth in bill of complaint, and the court ruled that the complaint does not state facts sufficient to constitute a cause of action, which *complainants* contend is a denial of due process of law by the District Court below, in denying complainants copyright rights.

Point 2.

The District Court below in making and entering judgment of dismissal in favor of defendants and against complainants, the said judgment was a denial of equal protection of the laws as provided under the provisions of the Constitution of the United States, particularly so under the provisions of the Fourteenth (14th) amendment to the said Constitution, which is clearly set forth in the bill of complaint in equity wherein it shows that complainants are penalized under the provisions of Section 43.30 of Chapter 4, Article 3, of the Municipal Code of the City of Los Angeles, State of California, which said Section

43.30—Fortune Telling, classifies many things and subject matters as fortune telling, and immediately following said Section 43.30 of said Municipal Code, of the said City of Los Angeles, is Section 43.31—Fortune Telling—Exemptions, of the said Chapter 4, Article 3, of the said Municipal Code of the said City of Los Angeles, State of California, which said Exemptions are provided in said section 43.31 as follows: “The provisions of the *proceeding* section (meaning said section 43.30) shall not be construed to include prohibit or interfere with the exercise of any religious or spiritual functions of any priest, minister, rector or an accredited representative of any bonafide church or religion where such priest, minister, rector or accredited representative holds a certificate of credit commission or ordination under the ecclesiastical laws of a religious corporation incorporated under the laws of any state or territory of the United States of America or any voluntary religious association, and who fully conforms to the rites and practices prescribed by the supreme conference, convocation, convention, assembly, association or synod of the system, or faith with which they are affiliated. Provided, however, that any church or religious organization which is organized for the primary purpose of conferring certificate of commission, credit or ordination for a price and not primarily for the purpose of teaching and practicing a religious doctrine or belief, shall not be deemed to be a bonafide church or religious organization.” In the analysis of the foregoing said sections 43.30 and 43.31, the discrimination of legislation is most outstanding the granting and sustaining of special and exclusive privileges is specifically set forth wherein certain organizations and corporations including the synod of the system are exempt and may carry on the things

which in the said sections are denied to complainants, and complainants have been seriously penalized for functioning under their organization and doing the very things which the said organizations, corporations and synod of the system do in the functioning of their various organizations and the said sections exempt them from prosecution and penalties, and the very same law the said sections do not exempt complainants and appellants, instead of exemption the complainants are prosecuted, persecuted and penalized under the very same law, the said sections, which complainants contend is a denial of equal protection of the laws, therefore, the District Court below in making and entering a judgment of dismissal against complainants and in favor of defendants, denied equal protection of the laws to complainants.

Point 3.

The District Court below made and entered a judgment of dismissal on the grounds that the complaint in equity did not state facts sufficient to constitute a cause of action, and the complaint in equity states facts that three different arrests have been made and penalties imposed under the provisions of the aforesaid sections 43.30 and 43.31 of Chapter 4, Article 3, of the Municipal Code of the City of Los Angeles, State of California, which said sections are averred in the bill of complaint in equity to be unconstitutional upon the basis of being discriminating and special privilege legislation which is clearly set forth in the bill of complaint in equity as set forth in the exemptions of the said sections, wherein a special privilege is granted to certain groups and denied to complainants, therefore, the District Court below in making and entering a judgment of dismissal in favor of defendants and against complainants, sustained the special privilege

granted in the said sections 43.30 and 43.31 and denied to the complainants hereof, their lawful and constitutional rights as are provided in the provisions of the Constitution of the United States of America.

Point 4.

The District Court below made and entered a judgment of dismissal upon the grounds, that the said court considered the ordinance, the said sections 43.30 and 43.31 of aforesaid Municipal Code of the City of Los Angeles, State of California, a proper valid ordinance and a proper exercise of the police powers, and complainants contend that the said ordinance and sections are unconstitutional and that the exercise of police power in making arrests under the provisions of said sections, such as complainants set forth the arrests in bill of complaint in equity, is also unconstitutional deprivation of liberty and lawful rights, and that the exercise of police power must be exercised as provided in the Constitution of the United States, as there is no provision in the said Constitution which authorizes police power to be exercised in violation thereof, therefore, the District Court below sustained the unconstitutional exercise of police power by the defendants against complainants in making and entering the said judgment of dismissal in favor of the defendants and against complainants and denied to complainants their rights of liberty as provided under the provisions of the Constitution of the United States of America.

Point 5.

The District Court below in making and entering a judgment of dismissal in favor of defendants and against complainants, denied complainants their contract rights,

which are set forth in bill of complaint in equity and exhibit A attached thereto, and also said judgment of dismissal impaired the obligations of the said contract marked exhibit A, which is prohibited under the provisions of the Constitution of the United States of America.

Point 6.

The District Court below in making and entering the judgment of dismissal denied the complainants their lawful and constitutional rights to function under the provisions of the Constitution of the United States which is clearly shown by the affidavit filed by defendant Mary Galton, wherein the said affidavit shows that money was paid to William L. Gladstone, Pastor and Trustee for the aforesaid Psychic Spiritual Science Church, for readings, and the foundation of said readings are based upon the Scriptures of the Holy Bible, and the said affidavit shows that particular effort was made to procure the said readings for the sole purpose of making arrests and prosecutions under the aforesaid sections 43.30 and 43.31 of Chapter 4, Article 3, of the Municipal Code of the City of Los Angeles, State of California, and the said arrests and prosecutions were carried out, executed and penalties imposed under the provision of said sections 43.30 and 43.31, and the readings procured as set forth in said affidavit, and there is no difference in the readings given by the complainants hereof than in many other religious denominations by whom readings are given, except in some instances in some of the denominations, readings, services and promises with advice given, that concerns the souls and spirits of persons who have passed in death from this earth, and the readings, services and promises, take the spirits and souls of the departed loved ones to heaven, and many other readings are given for the benefit of those on

earth and for those who have departed in death from the earth, all of which are paid for by the members and others in several denominations of religious philosophy, and the said sections 43.31 and 43.30 provide that certain groups who carry out those functions of readings, services and promises are exempt from prosecution and penalties, but under the provisions of the aforesaid arrests, convictions, and the said sections 43.30 and 43.31, complainants are not exempt, but instead of being exempt as the said sections provide for the certain groups who give readings, complainants are not exempt, and are prosecuted, persecuted and penalized for doing exactly the same things the said exempted groups are doing, and the Constitution of the United States of America makes no such special privilege provision, instead the Constitution of the United States prohibits such legislation and the sustaining of same, therefore, complainants have been discriminated against and deprived of their constitutional rights.

Wherefore, appellants respectfully present statement of points herewith and prays the Honorable Justices of the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order and decree of judgment as made by the aforesaid District Court of the United States in and for the Southern District of California, Central Division.

Dated: Los Angeles, California, March. 20, 1944.

Respectfully submitted,

C. A. Stice,

C. A. Stice,

Solicitor for Appellants.

[Endcrsd]: Filed Apr. 14, 1944.

[Title of District Court and Cause.]

STIPULATION FOR ABBREVIATION OF TITLE
AND CAUSE.

It Is Hereby Stipulated, by counsel for all parties to the above entitled cause and action, that the title of court and cause and action may be abbreviated as to title and cause, except the front page and cover, on all pleadings and papers in above entitled cause and action on appeal.

Dated: Los Angeles, California, March 15, 1944.

C. A. Stice,

Solicitor for Complainants and Appellants.

John L. Bland,

Deputy City Atty.,

Solicitor for Defendant and Appellee, Mary Galton.

John L. Bland,

Deputy City Atty.,

Solicitor for Defendant and Appellee Ray L. Chesebro, City Attorney for City of Los Angeles, State of California.

[Endorsed]: Filed Apr. 14, 1944.

[Title of District Court and Cause.]

To The Clerk Of Above Entitled Court:

Sir:

Please issue the documents under and pursuant of the rule of the above entitled Court of the United States, for use on appeal of the above entitled cause and action to the United States Circuit Court of Appeals for the Ninth Circuit, which documents are as follows:

1. Bill of Complaint in Equity with exhibits A and B attached,
2. Notice of Motion to Dismiss, by defendant Mary Galton,
3. Motion to Dismiss, by defendant Mary Galton.
4. Notice of Motion to Dismiss, by defendant Ray L. Chesebro,
5. Motion to Dismiss, by defendant Ray L. Chesebro,
6. Objection to Motions to Dismiss, by complainants,
8. Motion to Strike Affidavit of defendant Mary Galton,
9. Minute Order of District Court, dated February 25, 1944, granting Motions to Dismiss,
10. Judgment of Dismissal by the District Court, entered February 28, 1944,
11. Notice of Appeal,
12. Statement of Points,
13. Designation of Documents and Proceedings Upon Which Appellants Rely Upon Appeal,
14. Names and Addresses of Attorneys.

Together with any additional portions of the record which may be designated and filed by the appellees hereof, pursuant and under the rules of the above entitled United States Court. The transcript will be put in printed form for final certification.

C. A. Stice,
C. A. STICE,
Solicitor for Complainants.

It is hereby stipulated that the foregoing designated record constitutes a complete record for transcript for both parties on the above appeal.

Dated: Los Angeles, California, March 21, 1944.

C. A. Stice,
C. A. STICE,
Solicitor for Complainants.

John L. Bland, D. C. A.,
Solicitor for defendant, Mary Galton,

John L. Bland, D. C. A.,
Solicitor for defendant, Ray L. Chesebro, City Attorney for the City of Los Angeles, State of California.

[Endorsed]: Filed Apr. 14, 1944.

[Title of District Court and Cause.]

DEFENDANTS' DESIGNATION OF ADDITIONAL
MATTER TO BE INCLUDED IN RECORD ON
APPEAL.

To the Clerk of the above named Court:

Under the provisions of Rule 73 of Rules of Civil Procedure and in accordance with the provisions of stipulation heretofore filed, defendants Mary Galton and Ray L. Chesebro hereby designate the following portion of the record in the above named court as documents to be included in and to become a part of the record on appeal in the above entitled action:

- (1) Affidavit of Mary Galton in Opposition to Issuance of Preliminary Injunction;
- (2) Answer of defendants Mary Galton and Ray L. Chesebro, filed in the above entitled action.

Respectfully submitted,

RAY L. CHESEBRO,
City Attorney,

DONALD M. REDWINE,
Assistant City Attorney,

WIXON STEVENS,
Deputy City Attorney,

JOHN L. BLAND,
JOHN L. BLAND,
Deputy City Attorney,

Attorneys for Defendant Mary Galton.

DONALD M. REDWINE,
Assistant City Attorney,

WIXON STEVENS,
Deputy City Attorney,

JOHN L. BLAND,

JOHN L. BLAND,
Deputy City Attorney,

Attorneys for Defendant Ray L. Chesebro.

Received copy of the within Designation this 18 day
of April, 1944.

C. A. Stice, by C. E. B.,
Attorney for Complainants.

[Endorsed]: Filed Apr. 18, 1944.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 55, inclusive, contain full, true and correct copies of: Bill of Complaint; Notice of Motion to Dismiss Complaint for Injunction and for Injuries caused by Destruction of Copyright; Affidavit of Mary Galton in Opposition to Issuance of Preliminary Injunction; Answer to Complaint; Objection to Motion to Dismiss as Made by Defendants, Upon Grounds the above-entitled Court has Jurisdiction; Motion to Strike Affidavit of Mary Gal-

ton from Files of this Action and Record; Minute Order Entered February 25, 1944; Judgment of Dismissal; Notice of Appeal; Cost Bond on Appeal; Statement of Points; Stipulation for Abbreviation of Title and Cause; Designation of Record on Appeal and Defendants' Designation of Additional Matter to be Included in Record on Appeal which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$18.85 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 25 day of April, 1944.

(Seal)

EDMUND L. SMITH, Clerk,
By Theodore Hocke, Deputy Clerk.

[Endorsed]: No. 10757. United States Circuit Court of Appeals for the Ninth Circuit. Wm. L. Gladstone and H. H. Harrison, Trustees for Psychic Spiritual Science Church, a trust estate, Appellants, vs. Mary Galton and Ray L. Chesebro, City Attorney for the City of Los Angeles, State of California, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed April 28, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

Civil Action

No. 10757.

WM. L. GLADSTONE and H. H. HARRISON, Trus-
tees for Psychic Spiritual Science Church, a trust
estate,

Appellants,

vs.

MARY GALTON and RAY L. CHESEBRO, City At-
torney for the City of Los Angeles, State of Cali-
fornia,

Appellees.

DESIGNATION OF DOCUMENTS AND PRO-
CEEDINGS UPON WHICH APPELLANTS
RELY UPON APPEAL.

To the Honorable Justice, Curtis D. Wilbur, and As-
sociate Justices of the United States Circuit Court of
Appeals for the Ninth Circuit:

Appellants respectfully herewith designates documents
and proceedings which appellant relies upon *an* appeal be-
fore the above entitled Appellate Court, which are as fol-
lows, to wit:

1. Bill of Complaint in Equity with exhibits A and B
attached thereto.

2. Notice of Motion to Dismiss, by defendant Mary
Galton.

3. Motion to Dismiss, by defendant, Mary Galton.

4. Notice of Motion to Dismiss, by defendant Ray L.
Chesebro.

5. Motion to Dismiss, by defendant Ray L. Chesebro.
6. Affidavit by defendant Mary Galton.
7. Objection to Motions to Dismiss, filed by complainants.
8. Motion to Strike Affidavit of defendant Mary Galton, filed by complainants.
9. Minute Order of District Court, dated February 25, 1944, granting Motions to Dismiss.
10. Judgment of the District Court, Judgment of Dismissal, entered February 28, 1944.
11. Notice of Appeal.
12. Statement of Points.
13. Designation of Documents and Proceedings Upon Which Appellants Relies Upon Appeal.
14. Names and Addresses of Attorneys.

Wherefore, appellants respectfully present the said documents and proceedings before the United States Circuit Court of Appeals for the Ninth Circuit as designated hereof upon which appellants rely upon the appeal hereof.

Respectfully Submitted,

C. A. Stice,

C. A. STICE,

Solicitor for Appellants.

Recd. Copy this 28th day of April, 1944. Ray L. Chesebro, City Atty., by Paul Palmer, Deputy, Attys. for Appellees.

[Endorsed]: Filed May 1, 1944. Paul P. O'Brien, Clerk.

No. 10757.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WM. L. GLADSTONE and H. H. HARRISON, Trustees for
Psychic Spiritual Science Church, a trust estate,

Appellants,

vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for
the City of Los Angeles, State of California,

Appellees.

BRIEF OF APPELLEES.

RAY L. CHESEBRO,

City Attorney,

DONALD M. REDWINE,

Assistant City Attorney,

JOHN L. BLAND,

Deputy City Attorney,

Attorneys for Appellee Mary Galton.

DONALD M. REDWINE,

Assistant City Attorney,

JOHN L. BLAND,

Deputy City Attorney,

278 City Hall, Los Angeles 12,

*Attorneys for Appellee Ray L. Chesebro, City Attorney
of the City of Los Angeles.*

FILED

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No. 10757.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WM. L. GLADSTONE and H. H. HARRISON, Trustees for
Psychic Spiritual Science Church, a trust estate,

Appellants,

vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for
the City of Los Angeles, State of California,

Appellees.

BRIEF OF APPELLEES.

Statement of the Case.

The instant case was initiated by the filing of a Bill of Complaint "For protection against destruction of copy-right persecution and unconstitutional law, and for damages on account of irreparable injuries, losses and damages caused, and application for temporary restraining order; temporary injunction and permanent injunction." [Tr. pp. 2 to 13] to which was attached Exhibits "A" and "B". [Tr. pp. 16 to 22.]

Thereafter, on January 25th, after service upon complainants, motion to dismiss was filed. [Tr. pp. 24-25.] On the same date the answer of the defendants [Tr. pp.

34 to 41] was filed. Also on that date the affidavit of Mary Galton, one of the defendants [Tr. pp. 26 to 33] was filed.

Complainants thereafter filed objection to our motion to dismiss [Tr. p. 42] and a motion to strike the affidavit of Mary Galton. [Tr. p. 43.]

On January 28, 1944, defendants' motion to dismiss was ordered submitted upon filing of briefs, and hearing on Order to Show Cause (why temporary injunction should not be issued) was continued to February 28, 1944. On February 25, 1944, the motion to dismiss was granted. [Tr. pp. 45-46.] Motion to dismiss was made upon two grounds:

1. Failure to plead jurisdictional facts.
2. Failure of the complainants to state facts sufficient to constitute a cause of action.

The status of the case is somewhat similar to an appeal from a judgment entered after a demurrer has been sustained without leave to amend. The only questions before this court concern the insufficiency of the complaint, and if the judgment of the lower court be overruled, it still remains necessary to try the issues of fact raised by the answer.

For that reason we shall not discuss in detail the factual questions involved. Suffice it to state that the evidence of the defendants will practically be the same as is the affidavit of defendants Galton above referred to [Tr. pp. 26 to 33.] Manifestly, if either of the grounds named in our notice of motion be good, the judgment of the lower court should be sustained.

POINT I.

The Complaint Does Not State Jurisdictional Facts.

Though complainants allege that they have suffered damage from a variety of causes, including arrest upon an unconstitutional ordinance, the only grounds assigned as giving the federal court jurisdiction is found in paragraph 3 of the complaint [Tr. p. 3] to be an alleged infringement of copyright causing damage in a sum in excess of \$3,000.00.

The particulars as to how this nefarious deed was accomplished appear rather deftly concealed, but examination of paragraph 14 of the complaint [Tr. pp. 12-13] discloses that the alleged infringement consists of the carrying away, without the consent of the complainants, of some copies of a copyrighted book. Complainants fail to state how many of the said books were taken, or the value thereof. Irrespective of the possible value of the copyrighted books or works taken, it appears certain that the only act which Galton is charged with doing is the carrying away of certain physical articles, the contents of which were protected by copyright.

The copyright law (U. S. C. A., Title 17) protects the right of an author to print, publish and vend the products of his mind. (U. S. C. A., Title 17, Sec. 1; *Dymow v. Bolton*, 11 Fed. (2d) 690), and the copyright is distinct from the property in the material object copyrighted. (U. S. C. A., Title 17, Sec. 41.) Copyright is an intangible thing and is separate and distinct from the material object copyrighted.

Harms v. Cohen (D. C. Pa.), 279 Fed. 276.

Though one might forcibly take all the printed copies of a book, the contents of which are copyrighted, such action would not constitute an infringement of the copyright.

Depending upon circumstances surrounding the taking, such action might constitute grounds for a civil suit for recovery of the articles taken, for damages caused by such unlawful taking, or even a criminal prosecution of some sort. All of such actions would be within the jurisdiction of the State courts. Under some circumstances, unnecessary to discuss here, the U. S. District Court might have coordinate jurisdiction of such suits.

Suffice it to say here that the taking of physical property does not constitute an infringement of copyright.

Appellants' claim that the federal courts have exclusive jurisdiction in cases involving the infringement of copyright is undisputed but inapplicable to the instant case.

Examination of their brief discloses that the only claim made by them is that “* * * she (Galton) took unlawfully at the time she made the said arrests, copyrighted works of complainants *for the purpose of destruction of same*, by using the same for the sole purpose of evidence * * *.” (Emphasis ours.) (Appellants' Brief p. 7.)

Section 2 of U. S. C. A., Title 17, protects the right of an author of an unpublished work to recover damages for publication of an unpublished work without his consent. The works here involved were published and Section 2 has no application to this case. Examination of such Section 2 discloses that such right is not one conferred by the copyright law, but is a statement that such law does not abrogate a right which existed under the common law for

years before Congress enacted our Copyright Act. The situation in this case is no different, as a matter of law, from the situation which would arise were some one to break into the home of complainants and steal a copy of a book upon the contents of which the complainants had a copyright.

We find it unnecessary to discuss in detail the arguments of the appellants in their brief in respect to the rights of the holder of a copyright to protection. Admitting, for the purpose of argument only, that every statement of law contained therein other than that the forcible taking of personal property constitutes infringement of copyright, it does not follow that the complainant states jurisdictional facts. Because in their jurisdictional statement they rely upon the existence of a fact which other portions of the complaint plainly discloses does not exist, the question arises as to the effect of failure to properly plead jurisdictional facts. Federal Rules of Civil Procedure, Rule 8, Par. (a), Subdivision (1) provides that there shall be in each complaint a short statement of the jurisdictional grounds. In *Gates v. Graham Ice Cream Co.*, 31 Fed. Supp. 854, it was held that failure to set forth in such required statement sufficient facts to show jurisdiction in the Federal Government is grounds for dismissal of an action. Though it has been held (*Western Mutual Fire Insurance Co. v. Lamson Bros.*, 42 Fed. Supp. 1007) that a complainant may amend such statement, it appears to us that when, as in the instant case, it affirmatively appears that the complainants could add no facts to the statement of jurisdictional fact to show that there had been or now is an infringement of copyright, there is no abuse of discretion in dismissing the action. The allegation that

complainants suffered damage in a sum in excess of \$3,000.00 adds nothing to the jurisdictional statement. Jurisdiction in copyright infringement cases does not depend upon the extent of the damage suffered.

Though we feel that this appeal can be, and will be, decided upon the point heretofore discussed, we shall discuss some questions which would be involved in the case had there been a sufficient showing of jurisdictional fact. In doing so we shall, so far as possible, limit our discussion to matters raised by appellants in their brief.

Incidentally, we note that it is alleged the headquarters of the trust estate is in Reno, Nevada, at which point they maintain a resident agent. [Tr. par. 1, p. 3.] Whether or not this is an attempt to plead diversity of citizenship we are unable to state. If such be the intent it falls short of accomplishing that purpose. The trust estate named in the complaint appears to be a partnership or joint enterprise, as is shown by Exhibit "A." [Tr. p. 16.] The domicile of the partnership is the domicile of those who compose it (*People of Puerto Rico v. Russell & Co.*, 228 U. S. 476, 77 L. Ed. 903), and the citizenship of the trustee, and not of those beneficially interested, governs. (*Knapp v. Troy & B. R. R. Co.*, 87 U. S. (20 Wall.) 117, 22 L. Ed. 328.) It affirmatively appears that at least one of the trustees (Gladstone) and the principal, if not all, of the activities of the trust estate are carried on in Los Angeles, California. [Tr. p. 4, par. 4.]

The remainder of the questions involved concern the alleged unconstitutionality of the ordinance involved, and we shall discuss the entire subject in a separate point.

POINT II.

Sections 43.30 and 43.31 of the Los Angeles Municipal Code Are Constitutional.

SUB-POINT A.

THE SECTIONS DO NOT INFRINGE UPON THE RIGHT OF CONTRACT.

The right to contract is subject to such reasonable restraints as the state, in the exercise of the police power, may impose.

Advance-Rumely Thresher Co. v. Jackson, 287 U. S. 283, 77 L. Ed. 306.

It is well settled that all contractual obligations are subject to the police power of the state.

Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, 66 L. Ed. 595;

Home B. & L. Assn. v. Blaisdell, 290 U. S. 398, 78 L. Ed. 413.

It is equally well settled that the enforcement of a valid penal ordinance does not unlawfully interfere with one's right of contract, as the Fourteenth Amendment of the Federal Constitution does not guarantee to a citizen the right to contract within his State in violation of its laws.

Hooper v. State of Calif., 155 U. S. 648, 39 L. Ed. 297.

Complainants' statement that at the time of the making of the contract referred to there was no ordinance prohibiting fortune telling is incorrect. Ordinance No. 71928 of the City of Los Angeles, approved October 3, 1932, prohibited fortune telling in such city, and the pro-

visions of such ordinance became Sections 43.30 and 43.31 of the Los Angeles Municipal Code at the time the Penal Ordinances of the City were codified in 1936. Such fact is relatively unimportant, however, inasmuch as all contracts are entered into subject to the right of the state to properly exercise the police power. Though the State as a general proposition may not enact laws which impair the obligation of contracts, legislation enacted in the proper exercise of the police power are valid even though the incidental and collateral effect of such laws be to impair contractual obligations.

It would be a sad state of affairs indeed if contracts executed prior to the enactment of a police power measure remained effective but those subsequently made were illegal. It would certainly constitute a convenient method for a municipality to confer upon some persons exclusive right to commit acts jeopardizing the welfare of the community.

Liberty (Freedom of Contract) safeguarded, is liberty in a social organization which requires the protection of law against the evils which menace health, safety and general welfare, and is subject to regulation reasonable in relation to its subject and adapted to the interests of the community. (*West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. Ed. 703.) The Fourteenth Amendment protects the right of a citizen to engage in any lawful business, but it does not prevent a municipality from prohibiting any business which is inherently vicious and harmful. (*Murphy v. Peo. of the State of Calif.*, 225 U. S. 623, 56 L. Ed. 1229.) That the occupation of fortune telling has been considered harmful and persons following such occupation have been classed as vagrants since long before

the foundation of the Republic is a matter of legislative history. (*Davis v. State*, 118 Ohio St. 25, 160 N. E. 473, error to U. S. Supreme Court dismissed 277 U. S. 571; see, also, annotation 43 L. R. A. (N. S.) 203.)

SUB-POINT B.

THE ORDINANCE IS NOT INVALID BECAUSE OF DISCRIMINATION.

Complainants urge that the ordinance is void because it grants exclusive rights to certain parties and denies such privileges to complainants.

There are, however, no facts alleged which show that such a condition exists. It does not appear by the petition that any person has qualified as coming within the exception, and by reason thereof is permitted to tell fortunes in the city. A litigant can be heard to question a statute's validity only and insofar as it is being applied to his disadvantage.

Utah Power & Light Co. v. Pfof, 286 U. S. 165,
186, 76 L. Ed. 1038, 1049.

Claims based merely upon assumed potential invasion of rights are not enough to warrant judicial intervention.

Ashwander v. T.V.A., 297 U. S. 288, 324, 80 L.
Ed. 688, 699.

Examination of Sections 43.30 and 43.31 discloses that no discrimination can exist. Section 43.30 prohibits anyone from engaging *in the business* of fortune telling. Section 43.31 does not purport to permit persons to *engage in the business* of fortune telling, but it does provide that the provisions of Section 43.30 *shall not be deemed to pre-*

vent worship services of those who conduct such services of a church organization having as one of its tenets or articles of faith a belief in an ability to foretell the future, or to prophecy. When and if the ministers of such a church step aside from their pastoral duties and engage in the business of fortune telling, they render themselves subject to the prohibitory provisions of Section 43.30.

Another reason why the complainants and appellants may not urge discrimination is disclosed by comparing their complaint with the provisions of the ordinance. The complainants are suing for and on behalf of the trust estate, a copartnership. The exemption created by Section 43.31 is for the benefit of individuals who belong to a certain class, and not for the benefit of the church to which they may belong. If we assume, for the purpose of argument only, that the reasons given above are insufficient to overcome complainants' objections to the ordinance on account of alleged discrimination, yet another reason appears why the exception created by Section 43.31 is valid.

The legislative authority, acting within its proper field, is not bound to extend its regulations to all cases which it might reach. It is free to confine its restrictions to those classes of cases where the need is greatest. A law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied.

West Coast Hotel Co. v. Parris, supra, 300 U. S. 379, 81 L. Ed. 703.

Classification may be accomplished in two ways: (1) by so drawing a prohibitive act as to include within its provisions only those in a certain class, or, (2) by making

the prohibition effective against all persons, and then by a separate provision excluding those belonging to a certain class.

In the ordinance under consideration the latter method has been used. The ordinance does not confer upon anyone the right to do an act which they could not perform were it not for the authority granted. All persons would have the right to tell fortunes were it not for the prohibition contained in the law. The legislative authority may have found as a fact that the evil occasioned by permitting the ministers of churches having certain religious beliefs to continue in their religious activities would not equal the evil which would result by reason of suppression of a religious practice and for that reason it, by means of Section 43.31, established a class not within the prohibition of Section 43.30, unless members of the class *engaged in the business of fortune telling*.

Regulatory statutes are presumed to be supported by facts known to the legislature unless facts judicially known or proven preclude the possibility of the existence of such facts (*Sou. Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734), and when the classification made by the legislature is called in question, if any statement of facts reasonably can be conceived that would support it, there is a presumption of the existence of such facts and one who assails the classification must carry the burden of showing that the action is arbitrary. (*Borden v. Baldwin*, 293 U. S. 194, 209, 79 L. Ed. 281, 288.) The complainants have completely failed to plead the existence of any fact which would exclude the possibility of classification created by this ordinance being reasonable.

against the organization of which Gladstone was a trustee. If the appellant Gladstone was guilty of the crime charged (and his plea of guilt admitted it) it is wholly immaterial whether his apprehension and arrest was occasioned by ill will of some person towards him.

Conclusion.

Appellees submit that the ordinance constitutes a proper exercise of the police power and that the complaint wholly fails to state facts, which if true, would constitute the enforcement of an invalid ordinance. If the complainants have suffered any damage whatsoever it is because of the insistence of the members of the organization in violating a penal statute. Courts are not created for the purpose of protecting persons against the results of their own unlawful acts.

The judgment of the lower court is correct and should be sustained.

Respectfully submitted,

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No. 10757

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WM. L. GLADSTONE and H. H. HARRISON, Trustees for
Psychic Spiritual Science Church, a trust estate,
Appellants,

vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for
the City of Los Angeles, State of California,
Appellees.

WM. L. GLADSTONE and H. H. HARRISON, Trustees for
Psychic Spiritual Science Church, a trust estate,
Complainants,

vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for
the City of Los Angeles, State of California,
Defendants.

BRIEF OF APPELLANTS

In Support of Appellants' Bill of Complaint in Equity,
Exhibits A and B, Attached to Said Bill; Objec-
tion to Motion to Dismiss; and All Other Portions
of the Transcript of Record, Which Were Writ-
ten by Counsel for Complainants in Behalf of
Complainants.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

C. A. STICE,

1314 Washington Building, Los Angeles 13,
Attorney for Complainants.

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No. 10757

IN THE

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vs.

MARY GALTON and RAY L. CHESEBRO, City Attorney for
the City of Los Angeles, State of California,
Appellees.

BRIEF OF APPELLANTS.

Statement of the Case.

This is an appeal from a judgment of dismissal made and entered on February 28, 1944, by the District Court of the United States for the Southern District of California, Central Division, in the above entitled cause and action. [Tr. of Record p. 45.]

The bill of complaint in equity shows that the complainants are trustees for the Psychic Spiritual Science Church, a trust estate, and that one of the complainants, Wm. L. Gladstone, has for the past fourteen years acted as Pastor for the said Church, which was organized under the provisions of the Constitution of the United States of America, as provided under a contract by and between the said trustees.

The bill of complaint in equity further shows that during the month of June, 1943, that the aforesaid Wm. L. Gladstone while acting as Trustee and Pastor for said Church was arrested by the aforesaid defendant, Mary Galton, a woman police officer for the City of Los Angeles, State of California, and the said Mary Galton escorted the said Wm. L. Gladstone to jail where bond was furnished by Wm. L. Gladstone for appearance in the Municipal Court of the City of Los Angeles, State of California, and on or about May 17, 1943, in case No. 18711, Municipal Court of the City of Los Angeles, State of California, the said Wm. L. Gladstone through the inadvertance and inadvertant advice of counsel pled guilty to the charge made against him and was fined one hundred (\$100.00) dollars, which the said Wm. L. Gladstone paid in said case No. 18711 before the said Municipal Court. [Tr. of Record p. 5.]

The bill of complaint in equity further shows, that on or about October 28, 1943, that the aforesaid defendant Mary Galton again arrested the aforesaid Wm. L. Gladstone and escorted him to jail, where he was compelled to deposit a bond in the sum of five hundred (\$500.00) dollars for appearance in case No. 21239, in aforesaid Municipal Court of the City of Los Angeles, State of California [Tr. of Record p. 5], and further the bill shows that the said defendant Mary Galton during services in aforesaid Church of which the said Wm. L. Gladstone is Pastor, arrested a guest minister while the said minister was preaching from the pulpit to the congregation of said

Church during services in said Church on or about during the month of June, 1943, and the said three arrests, two of Wm. L. Gladstone the Pastor, and one of the said guest minister, was made by the said defendant Mary Galton for the sole purpose to destroy the said Church, and since copyrighted works and a Bible for said Church entitled, "Spiritualism and a Guide to Mediumship," was compiled from the Holy Bible and Holy Scriptures and written by the said Wm. L. Gladstone, which was also copyrighted and used exclusively by the said Church, a destruction of the said Church would be the destruction of said copyrights, and the said Wm. L. Gladstone as the bibliographer, has from time to time and recently written and compiled many manuscripts which are used as a text in the said Church, and said manuscripts and work are all founded upon the Holy Scriptures of the Holy Bible which are the bibliography of said book, manuscripts and works as compiled, and as such are protected by the Copyright Act of the United States of America, and regardless of said Copyright Act, and ignoring the said Copyright Act, the aforesaid defendant Mary Galton has continued her campaign of persecution by and through the aforesaid numerous arrests in her endeavor to not only deprive the said Wm. L. Gladstone of his rights as a citizen, his liberty, and also to destroy his Church, and thereby destroy the said copyrights and copyrighted works, contrary to the provisions of the Copyright Act and the Constitution of the United States of America.

The said defendant Mary Galton also took from the office of said Church by illegal confiscation [Tr. of Record

p. 13] copyrighted works and trustees' records, for the purpose to use same as evidence [Tr. of Record p. 37] against the said Wm. L. Gladstone in her campaign of persecution against the said Wm. L. Gladstone and the aforesaid Church, all of which is positively prohibited by the Constitution of the United States.

The defendants in this action made motions to dismiss bill of complaint in equity [Tr. of Record p. 24], which was granted by the District Court below, therefore this appeal is being taken to the United States Circuit Court of Appeals, Ninth Circuit, upon the ground herein set forth and that the Chapter 4, Article 3, Section 43.30 and Section 43.31 [Tr. of Record pp. 6-8], are unconstitutional, and in violation of the Constitution of the United States of America. Aforesaid arrests were made and prosecuted under the provisions of said Sections 43.30 and 43.31 of the said Chapter 4, Article 3, of the Municipal Code of the City of Los Angeles, State of California.

ARGUMENT.

Points and Authorities in Support of Argument.

I.

In the statement of points as filed by appellants Wm. L. Gladstone and H. H. Harrison, Trustees for Spiritual Psychic Science Church, a trust estate; under Point 1 [Tr. of Record p. 50] it will be noted that the District Court of the United States has jurisdiction, as a copyright is involved in the above entitled cause and action, as under a federal statute the District Courts of the United States have original and exclusive jurisdiction over matters wherein the Copyright Act and a copyright are involved, such as set forth in the bill of complaint in equity [Tr. of Record p. 12], and the destruction of the said Church, as set forth in bill of complaint in equity [Tr. of Record pp. 7 to 11 incl.], also destroys the copyrighted book and manuscripts used as a text exclusively by the ministers and members of the said Church; therefore, through the foregoing system of destruction as used by the defendant Mary Galton, the copyrighted matters belonging to the complainants become worthless through destruction; and the aforesaid complainants use as a text in their Church the aforesaid copyrighted book and works which the aforesaid Pastor, Wm. L. Gladstone, as the bibliographer, compiled from the Holy Scriptures of the Holy Bible, the word of God, and the Constitution of the United States being a God inspired document, provides:

*Constitution, U. S. A., Article I, Section 8,
Clause 8,*

which reads as follows:

“The Congress shall have power . . . To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Copyrights are obtained to the extent which Congress has authorized it, as a copyright exists in the United States wholly on the legislation of Congress:

Banks v. Manchester, 128 U. S. 252;

Wheaton v. Peters, 8 Pet. 591 (U. S.).

The power granted to Congress by the aforesaid Clause 8 of the Constitution in the case of

Brown v. Duchesne, 19 How. 195,

the Court said:

“is domestic in its character and necessarily confined within the limits of the United States.”

The defendant Mary Galton has exercised police power of the City of Los Angeles by making numerous arrests as set forth in the bill of complaint in equity, to destroy the aforesaid Church which automatically destroys the aforesaid copyrights, and no State can limit, control or exercise the power given by the said Clause 8 of the Constitution; it is the exclusive power of Congress, and in relation to the exclusive power of Congress relative to copyrights, the exclusive power of Congress has been upheld by the Supreme Court of the United States in the case of

Woolen v. Banker, 2 Plipp. (U. S.) 33.

The said Clause 8 of the Constitution, in relation to limited times, contemplates that the exclusive right of authors and inventors to their respective writings and discoveries shall exist for a limited time or period, and that the period shall be subject to the discretion of Congress:

Pennock v. Dialogue, 2 Pet. 15;

Evans v. Eaton, 3 Wheat. 454.

The aforesaid defendant Mary Galton upon making the aforesaid arrests as set forth in the bill of complaint in equity in this cause and action, show that she took unlawfully at the time she made the said arrests, copyrighted works of complainants for the purpose of destruction of same by using the same for the sole purpose of evidence upon which to convict [Tr. of Record pp. 12 to 13 incl.] the Pastor, Wm. L. Gladstone, of said Church [see Tr. of Record, par. IX, pp. 36 and 37], and the Copyright law of the United States is very explicit in its determination of such procedure as has been adopted by the said defendant Mary Galton, as the said federal law provides for damages:

Copyrights, Title 17, Section 2,

which provides as follows:

“Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor. (Mar. 4, 1909, c. 320, Sec. 2, 35 Stat. 1076.)”

And complainants have many component parts of copyrighted work which have been written and compiled from

time to time which are used in the text of their aforesaid Church, and the Copyright Act of the United States provides as follows:

Copyrights, Title 17, Section 3,

which reads as follows:

“The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration of scope of each copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each were individually copyrighted under this title. (Mar. 4, 1909, c. 320, Sec. 3, 35 Stat. 1076.)”

And the copyrights of complainants were under the protection of the Copyright Act, as it was less than twenty-eight years since the aforesaid copyrights were granted, and the copyrights were secured under the provisions of Title 17, Copyrights, which shall have a duration of twenty-eight years and may be renewed for a like period:

Copyrights, Title 17, Section 23 (Mar. 4, 1909, c. 320, Sec. 23, 35 Stat. 1080).

And subsisting copyrights may be renewed:

Copyrights, Title 17, Section 24 (R. S. Sec. 4953; Mar. 4, 1909, c. 320, Sec. 24, 64, 35 Stat. 1080, 1088; R. S. Sec. 4953, from Act July 8, 1870, c. 230, Sec. 87, 16 Stat. 212).

And under aforesaid point 1 [Tr. of Record p. 51] it points out that the District Court below made no mention and rendered no ruling on the rights of complainants under

the Copyright Act, other than a judgment of dismissal, and the District Court below ruled that the bill of complaint in equity does not state facts sufficient to constitute a cause of action, which complainants contend is a denial of due process of law by the District Court below in denying complainants' copyright rights and not considering the facts as set forth in the bill of complaint in equity:

The essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice:

Jacob v. Roberts, 223 U. S. 45, 68 (1932).

That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement:

Riverside & Dan River Cotton Mills v. Menefee, 237 U. S. 189, 193 (1915).

Even before the Fourteenth Amendment was adopted the Supreme Court had stated that it was a "great fundamental rule in the administration of justice . . . that every one shall have an opportunity of defending his rights before judgment is pronounced against him:"

Smith v. McCann, 24 How. 398, 407 (1861).

All actions, suits, or proceedings arising under the copyright laws of the United States shall be originally cognizable by the district courts of the United States, etc., etc.

Copyrights, Title 17, Section 34 (Mar. 4, 1909, c. 320, Sec. 34, 35 Stat. 1084; Mar. 3, 1911, c. 231, Sec. 24, 36 Stat. 1092; May 17, 1932, c. 190, 47 Stat. 158).

Civil actions, suits, or proceedings arising under this title may be instituted in the district court of which the defendant or his agent is an inhabitant, or in which he may be found:

Copyrights, Title 17, Section 35 (Mar. 4, 1909, c. 320, Sec. 35, 35 Stat. 1084).

Any such court or judge thereof shall have power, upon bill in equity filed by any party aggrieved, to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity, on such terms as said court may deem reasonable. Any injunction that may be granted restraining and enjoining the doing of anything forbidden by this title may be served on the parties against whom such injunction may be granted anywhere in the United States and be enforceable by proceedings in contempt or otherwise by any other court or judge possessing jurisdiction of the defendants:

Copyrights, Title 17, Section 36 (Mar. 4, 1909, c. 320, Sec. 36, 35 Stat. 1084).

Copyright secured under title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will:

Copyrights, Title 17, Section 42 (Mar. 4, 1909, c. 320, Sec. 42, 33 Stat. 1084).

II.

Complainants in their points filed as a statement of points, under points 2 to 6 [Tr. of Record, point 2, pp. 51 to 56 incl.], the District Court below in making and entering judgment of dismissal in favor of defendants and against complainants, the said judgment is a denial of equal protection of the laws as provided under the Constitution of the United States, as complainants in the bill of complaint in equity show that they have been penalized under the provisions of Sections 43.30 and 43.31 of Chapter 4, Article 3, of the Municipal Code of the City of Los Angeles, State of California [Tr. of Record, par. 9, pp. 6 to 9 incl.], which said sections are unconstitutional because of being discriminating legislation, as it grants certain exclusive privileges to certain parties and denies such exclusive privileges to complainants, which is a violation of the Constitution of the United States:

Constitution, U. S. A., Article XIV (Fourteenth Amendment).

The aforesaid Sections 43.30 and 43.31 of the aforesaid Chapter 4, Article 3, of the Municipal Code of the City of Los Angeles, State of California, under which said sections the aforesaid defendant Mary Galton made the aforesaid arrests of Wm. L. Gladstone, Pastor of the aforesaid Church, and the said Sections 43.30 and 43.31 are unconstitutional because the said sections exempt certain groups and corporations from the provisions of said Section 43.30 under the provisions of exemptions as provided in said Section 43.31, which grants certain groups

and corporations an exclusive special privilege to the extent that it is discriminating legislation in that it grants a monopolistic monopoly to certain groups and denies the same privilege to complainants, and thereby denies equal protection of the laws to complainants (Fourteenth Amendment to Constitution, U. S. A.), and the said Sections 43.30 and 43.31 are used for the purpose of the destruction of complainants' aforesaid Church, and the Supreme Court has held that such legislation is unconstitutional and repugnant to the Constitution of the United States:

Gibbons v. Ogden, 9 Wheat. 1,

and Mr. Chief Justice John Marshall delivered the opinion of the court, and, after stating the case, proceeded as follows:

“The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the Constitution and laws of the United States.”

And likewise ruled and held in a similar case, the case of

Brown v. Maryland, 12 Wheat. 419.

In opposition to the unconstitutional Sections 43.30 and 43.31 as aforesaid, the Constitution of the United States provides for equal protection of the laws:

Constitution, U. S. A., Fourteenth Amendment, and further for equal protection of the laws the Constitution of the United States provides:

Constitution, U. S. A., Article VI, Clause 2,

it reads as follows:

“This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the

authority of the United States, shall be the Supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

And under the provisions of said Article VI of the Constitution we find to this end it was necessary to make the Constitution the paramount law of the land:

Prigg v. Pennsylvania, 16 Pet. 539, 628,

and this necessity arising from the nature of the Federal Government, is reenforced by the specific declaration of said Article VI of the Constitution of the United States:

McCulloch v. Maryland, 4 Wheat. 316, 405,

and the Constitution is supreme over all departments of the National Government and, to the extent of the powers delegated there, over all who made themselves parties to it, States as well as persons, and so held in the case of

Farrington v. Tennessee, 95 U. S. 679, 685.

And in a case of unconstitutional law and procedure, such as has been used by the aforesaid defendant Mary Galton in the aforesaid arrests and hearings in the Municipal Court of the City of Los Angeles, State of California, under the provisions of the aforesaid Sections 43.30 and 43.31 of Chapter 4, Article 3, of the Municipal Code of the City of Los Angeles, State of California, and the prosecutions and persecutions unlawfully as set forth in the bill of complaint in equity hereof in this cause and action in the District Court below [Tr. of Record pp. 5 to 13 incl.], under the said unconstitutional Sections 43.30 and 43.31 of said Municipal Code, the United States Supreme Court has ruled and held in the case of

Mauran v. Insurance Co., 6 Wall. (U. S.) 1, 13,
the court said:

“For what is unconstitutional is illegal and void, so far as law is concerned, all void. To give such laws any validity would be to justify, so far as such laws went, the abortive attempt to overthrow the Constitution itself; the Constitution of the United States, which is the fundamental law of the nation and each State, not only affords no authority for illegal proceedings, but prohibits any kind of illegal procedure.”

III.

The bill of complaint in equity shows that the contract under which the complainants organized the Psychic Spiritual Science Church was made and entered into on March 1, 1934, and the aforesaid Sections 43.30 and 43.31 of the Municipal Code of the City of Los Angeles, State of California, became effective November 12, 1936, and complainant Pastor Wm. L. Gladstone was arrested by the aforesaid defendant Mary Galton during the month of June, 1943, and said defendant Mary Galton again arrested said Pastor on or about October 28, 1943, and the said Mary Galton during the month of June, 1943, also again arrested a guest minister at said Church during Church service, and thereby the said Mary Galton violated complainants' rights as provided by the Constitution of the United States, which prohibits impairing the obligations of contracts:

Constitution, U. S. A., Article I, Section 10,
Clause 1.

It is an impairment of the obligation of a contract, for a law which imposes new terms or alters the terms of a contract by imposing new conditions, or disposing with

those expressed, and the aforesaid Sections 43.30 and 43.31 impair and impose new terms on the contract under which complainants have organized their said Church prior to the passage of the said sections of the Municipal Code of the City of Los Angeles, State of California, and so held in the case of

State Tax on Foreign-Held Bonds, 15 Wall.
(U. S.) 320.

In the case of

Farrington v. Tennessee, 95 U. S. 683,

the court said:

“The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of the court to redress the wrong.”

And a new law which imposes new conditions or disposes with those expressed in a contract is an impairment of the obligations of a contract:

Sturgis v. Crowninshield, 4 Wheat. 197;

McGahey v. Virginia, 135 U. S. 603.

Under the Constitution of the United States the obligation of a contract is not to be impaired at all. It is not a question of degree, manner, or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force; and any deviation by postponement or acceleration of the period of performance, or imposing conditions not expressed, or dispensing with those expressed, is a violation of the obligation. The slightest variation of the obligation impairs it to that extent and is unconstitutional, and the aforesaid sections of the aforesaid Mu-

municipal Code of the City of Los Angeles, State of California, impairs the obligation of the contract under which the aforesaid Church of the complainants is organized, and so held in the cases of

McCracken v. Hayward, 2 How. 608;

Ogden v. Saunders, 12 Wheat. 213;

Antonio v. Greenhow, 107 U. S. 797.

The impairment of contracts may not be accomplished by judicial decisions or by legislative enactments:

Pine Grove v. Talcott, 19 Wall. 665;

Union Bank v. Geary, 5 Pet. 99;

Houston etc. R. Co. v. Texas, 177 U. S. 66.

IV.

The trustees' organization under which the aforesaid Church is organized is by a contract under the provisions of the Constitution of the United States; common law rights of contract and citizenship, and the right to create and establish a trust estate, has been recognized in all history of law in the United States and England, beginning during the reign of King Henry VIII in England in the year A. D. 1536, and up to and including the present time, in the sustaining of Common Law Rights of Contract and under the provisions of the Constitution of the United States, and in England such rights were enacted by Parliament in statute as follows:

Statute of Uses, England 27, Henry VIII, c. 10,
A. D. 1536.

And a court ruling of the United States Court, which upholds the right to create and establish a trust estate by

contract, is a ruling wherein Federal Justice Gresham, in case

27 Fed. 149,

the Honorable Court said:

“A citizen of the United States cannot be denied the RIGHT to take and hold absolutely in trust, real and personal property in any State in the Union, nor can he be denied the RIGHT TO ACCEPT CONVEYANCE IN TRUST for his sole benefit or for the benefit of himself and others. This RIGHT is incident to NATIONAL CITIZENSHIP.”

And a trust estate established by contract by and between the trustees and complainants, the Supreme Court of the United States and other courts have ruled and held that it is proper for a person establishing a trust estate to himself and others and to become the trustee:

Adams v. Adams, 21 Wall. 185, 22 L. Ed. 504;

Morgan v. Malleon, L. R. 10 Eq. 475, 39 L. J. Ch. 680, 23 L. T. Rep. N. S. 336, 18 Wkly. Rep. 1125;

Cahlan v. Lassen County Bank, 11 Cal. App. 533, 105 Pac. 765.

The civil rights of complainants have been violated, and a civil right of any pecuniary nature is a property right and equity will protect such right:

Re Sawyer, 124 U. S. 200, 210 (8 Sup. Ct. 482), 31 L. Ed. 402, 409;

Talbot v. Seeman (Cranch. 1), U. S. Reps. 5.

A trust estate organization under which complainants are organized is a law that is binding because of imme-

morial usage and universal reception, often in distinction from statute law:

Elliot v. Freeman, 220 U. S. 178;

Smith v. Anderson, 15 Ch. 247.

The court will support the trustees in carrying out the terms of their trust agreement and contract:

Clews v. Jamison, 182 U. S. 461, 21 Sup. Ct. 845,
45 L. Ed. 1185;

and the creator of the trust estate may make its duration discretionary with the trustees:

Cutter v. Hardy, 48 Cal. 568,

which said ruling in the case of *Cutter v. Hardy* is supported by the Constitution of the United States:

Constitution, U. S. A., Article I, Section 10,
Clause 1.

And any law or order in opposition to the Constitution of the United States is inoperative:

Cooley's Constitutional Limitations, 4th Ed. 56
(*45);

Cooley's Constitutional Limitations and cases cited,
p. 159 *et seq.*

And it has been ruled and held that the creation and establishment of a trust estate is a very simple matter:

Evansville Bank v. German American Bank, 155
U. S. 556.

V.

The bill of complaint in equity shows that the defendant Mary Galton made several arrests at close proximity of time, and when she made those arrests she took trustees' records [Tr. of Record p. 36, par. IX] itemized by defendants as 1 bundle of lesson sheets, and trustees' records are not subject to confiscation as evidence, review or subpoena *duces tecum*, which has been so ruled and held by the Supreme Court of the United States:

Boyd v. United States, 116 U. S. 112;

Silverthorne v. United States, 251 U. S. 395.

Trust estates are creatures of equity:

Hopkins v. Hopkins, 1739 West Hardwicke 605,
per Lord Chancellor Hardwicke.

The equitable jurisdiction to trust estates has been extended so as to embrace relations of a fiduciary character:

Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845,
45 L. Ed. 1185.

A trust estate being a creature of equity, and so defined by the highest courts of equity of both the United States and England, and another distinction is that of legal and equitable jurisdiction, the former pertaining to rights conferred by law, unwritten or enacted; the latter to equitable rights supplementing the legal, and, in theory at least, correcting the inequalities of the law, and supplying their deficiencies. These branches are so distinct that no subsequent action at law will lie on a decree in equity:

Hugh v. Higgs, 2 Wheat. 697.

The aforesaid complainant, trustee and Pastor, Wm. L. Gladstone, has pursued the work of God as his calling during his past life for many years, having in 1916 written his own textbook and copyrighted same under the copyright laws of the United States, and the right of a citizen to pursue any calling, business, or profession he may choose is held to be a property right within the protection of a court of equity:

New Method Laundry Co. v. MacCann, 174 Cal.
25, 161 P. 990, Ann. Cas. 1918C 1022.

VI.

The very principle and essence of the Constitution of the United States, in so far as application to citizens are concerned, have been very definitely determined in an outstanding ruling of the Supreme Court of the United States in the case of

Marbury v. Madison (Cranch. 1), U. S. Rep. 5,
wherein Mr. Chief Justice John Marshall said at page 58:

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the law; whenever he receives an injury, one of the first duties of government is to afford that protection.”

At page 69:

“Certainly all those who have framed Constitutions, contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an Act of the Legislature repugnant to the Constitution is void.”

At page 59:

“The government of the United States has been emphatically termed a government of laws, and not of men; it will certainly cease to deserve that high appellation if the laws furnish no remedy for a vested right.”

VII.

Interference with property rights such as is the case of complainants hereof, a temporary injunction formerly issued by a court of equity sitting, is made a perpetual and permanent injunction:

United States v. Elliot, 62 Fed. 201, 64 Fed. 27;

Anti-Trust Decisions of the United States, July 2, 1890, to January 1, 1918, pp. 26-29;

United States v. Elliott et al., 3811, Injunction.

And in such a case as complainants hereof, where a law is alleged to be unconstitutional, which will cause destruction of property and property rights, it is proper for temporary restraining order to be issued, and so issued in the case of

Amalgamated Oil Corp. v. San Francisco, 263 Fed. 617;

and rights of injunction may be granted by any judge of the District Court in cases where they might be granted by such judge of said court:

Judicial Code and Judiciary, Title 28, Section 378 (Judicial Code, Section 264).

Conclusion.

The Transcript of Record and the foregoing points and authorities clearly set forth the matters involved in this cause and action; therefore, appellants pray that the judgment of the District Court below be reversed and the matter remanded to the said District Court for hearing in keeping with the matters set forth in the record hereof.

Dated Los Angeles, California, June 26, 1944.

Respectfully Submitted,

C. A. STICE,

Attorney for Complainants.

